This is the eighteenth edition of Developments, an annual publication intended to assist administrative lawyers in staying abreast of developments in the field—in cross-cutting areas of administrative law and in related areas of specialization that might bear on their own practice areas. Chapters in Developments are written by experts in the field, who are members of the Section of Administrative Law and Regulatory Practice (Section), and in most cases, Committee chairs and vice-chairs in their areas of expertise. While some chapters are team efforts and others the product of a single individual, they are all authoritative.

Like in years past, we are publishing a paperback covering the four main cross-cutting Developments chapters: Administrative Adjudication, Constitutional Law and Separation of Powers, Judicial Review, and Rulemaking. These are the four topics covered at our Section’s popular fall Administrative Law Conference program on Developments in Administrative Law.

Section members can download this volume for free and order hard copies for a nominal price from the links on the Section’s website, http://www.americanbar.org/groups/administrative_law/publications.html. An eBook containing all of the chapters is also available from that website. Finally, one can also download specific Developments chapters by visiting http://www.americanbar.org/groups/administrative_law/publications/Developments2012.html. These member benefits, along with the Administrative Law Review—produced by students at American University, Washington College of Law—and the Administrative & Regulatory Law News, make the Section dues a real bargain. I also note that past editions of the Developments series are available (in full text) from HeinOnline’s subscription service.

This edition covers the 2016 calendar year. My role as Developments editor is simply to review the submissions, put them into a consistent format, edit where necessary, and supply some footnotes. The real heavy lifting was done by the chapter authors, each of whom is identified in the first footnote of each chapter. My personal acknowledgments, including to this year’s Developments intern, follow this foreword.

The list of Developments chapters is included here and is also on the Section website. Below I offer some of the highlights of the four cross-cutting Administrative Process Committees chapters and the cases discussed
therein. Where there is overlap among these four chapters, I have indicated such here as well as in the respective chapters.

CHAPTER 1: ADMINISTRATIVE ADJUDICATION

In the Administrative Adjudication chapter, Professor Christopher J. Walker and Vice Chairman and Executive Director of the Administrative Conference of the United States (ACUS) Matthew Lee Wiener partner again to provide an extensive review of administrative adjudication cases and developments in 2016.

The authors start with noteworthy judicial developments in administrative adjudication. This discussion includes the only U.S. Supreme Court case in 2016 dealing with core issues of agency adjudication: *Cuozzo Speed Technologies, LLC v. Lee.*1 This case—also discussed in this year’s Judicial Review chapter2—focused on issues related to inter partes review by the Patent Trial and Appeal Board (PTAB), an entity within the U.S. Patent and Trademark Office (PTO). A third party relying on inter partes review can request that the PTAB “reconsider and cancel claims in previously issued patents on the basis of prior art.”3 In this case, Garmin sought inter partes review of Giuseppe Cuozzo’s patent for a GPS-linked speedometer; the PTAB reviewed Cuozzo’s patent and ruled in favor of Garmin. Cuozzo challenged the PTAB’s decision and on appeal, the Federal Circuit concluded that the PTO’s decision to institute inter partes review was nonappealable.4 The Supreme Court agreed with the Federal Circuit. The chapter authors note that they “expect to see a substantial amount of litigation concerning [the PTAB’s] procedures in the coming years” given that the entity and inter partes review were created by statute relatively recently.5 To this point, they offer another example from 2016, *Ethicon Endo-Surgery, Inc. v. Covidien LP,*6 in which the Federal Circuit considered “whether there was a due process violation when the PTO

2. See Judicial Review, infra at Part III.F.
3. Adjudication, infra at 4.
4. Cuozzo, 136 S. Ct. at 2141 (“The text of the ‘No Appeal’ provision, along with its place in the overall statutory scheme, its role alongside the Administrative Procedure Act, the prior interpretation of similar patent statutes, and Congress’ purpose in crafting inter partes review, all point in favor of precluding review of the Patent Office’s institution decisions.”).
5. Adjudication, infra at 6.
6. 812 F.3d 1023 (Fed. Cir. 2016).
assigned the same PTAB panel to make the final decision as had initially decided to institute *inter partes* review.”

Next, the authors discuss two judicial developments from the D.C. Circuit. In the first, *American Hospital Association v. Burwell*, the court held that “a federal court has jurisdiction to consider a mandamus action to compel agency action in response to a significant backlog of administrative appeals for Medicare reimbursement claims.” Administrative law judges (ALJs) within the U.S. Department of Health and Human Services had been taking, on average, more than 500 days to reach decisions, when under the Medicare Act the administrative appeal process should take only one year due to the defined statutory deadlines. The D.C. Circuit found that the jurisdictional requirements necessary in a mandamus case were met and remanded the case for the district court to “determine whether ‘compelling equitable grounds’ now exist to issue a writ of mandamus.” Ultimately, the district court adopted a four-year plan that the agency must follow to remedy its delays. The authors note that “it will be interesting to see whether the D.C. Circuit’s decision will provide a roadmap to challenge adjudication delays or backlogs in other regulatory contexts, or whether the decision’s reasoning will be confined to the unique provisions of the Medicare Act.”

In the second D.C. Circuit case, *American Immigration Lawyers Association v. Executive Office for Immigration Review*, the American Immigration Lawyers Association (AILA) challenged the U.S. Department of Justice’s records disclosed in response to a Freedom of Information Act (FOIA) request because the agency redacted certain information it deemed nonresponsive. Of particular note was the D.C. Circuit’s consideration of whether the agency could claim that FOIA’s Exemption 6—allowing for “redactions that prevent unwarranted invasions of personal privacy when personnel and medical files are disclosed”—permitted the agency to redact immigration judges’ names in the records released to AILA. The court, balancing the interest in protecting the information against the public interest in disclosure, found that

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7. *Id.* at 1028.
8. 812 F.3d 183 (D.C. Cir. 2016).
13. *Adjudication*, *infra* at 8.
15. *Adjudication*, *infra* at 10.
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the “across-the-board redaction . . . was inappropriate under FOIA,”16 and that the agency “should make a more particularized showing for defined subgroups of judges or for individual judges.”17 The authors state that this aspect of the ruling “could constitute a significant victory for organizations interested in patrolling the quality and effectiveness of administrative judges (and perhaps other agency adjudicators).”18

The constitutionality of the U.S. Securities and Exchange Commission’s (SEC’s) ALJs remained a focus in 2016; specifically, whether their appointments violate the Appointments Clause and whether several layers of protection from removal without cause removes the President’s ability to “take care that the laws are faithfully executed”19 under the Constitution.20 By the end of 2016, four courts of appeals—the Second, Seventh, Eleventh, and D.C. Circuits—have now “held that district courts have no jurisdiction to entertain collateral challenges to the constitutionality of SEC proceedings. Such challenges must be raised in the underlying SEC enforcement proceeding . . . with the result that their judicial resolution must await review of SEC orders.”21 The authors then discuss two cases where such an SEC order has been reviewed but where contrary results were reached: Raymond J. Lucia Companies, Inc. v. SEC22 in the D.C. Circuit and Bandimere v. SEC23 in the Tenth Circuit. The latter decision, according to the authors, is particularly important as the Tenth Circuit is now the first court of appeals to hold that an agency ALJ is an inferior officer,24 concluding that the SEC’s ALJs are appointed unconstitutionally.

Next, the authors discuss a series of interesting cases from the courts of appeals worthy of noting here. In J.E.F.M. v. Lynch,25 the Ninth Circuit was faced with determining whether indigent minor immigrants “are entitled to government-appointed counsel in immigration court.”26 In PHH v. CFPB,27

16. Adjudication, infra at 10.
17. AILA, 830 F.3d at 676.
18. Adjudication, infra at 11.
21. Adjudication, infra at 12.
22. 832 F.3d 277 (D.C. Cir. 2016).
23. 844 F.3d 1168 (10th Cir. 2016).
25. 837 F.3d 1026 (9th Cir. 2016).
26. Adjudication, infra at 18.
27. 839 F.3d 1 (D.C. Cir. 2016).
the D.C. Circuit addressed whether a statute of limitations imposed in the Real Estate Settlement Procedures Act applied to administrative hearings conducted by the Consumer Financial Protection Bureau. And in *Cactus Canyon Quarries, Inc. v. Federal Mine Safety Health Review Commission*, the D.C. Circuit determined that “a party in an agency adjudication is [not] entitled to a prevailing-party fee award under the [Equal Access to Justice Act (EAJA)] when it secures the dismissal of an administrative complaint ‘without prejudice.’” The authors then opine on other notable decisions from district and appeals courts, which included discussion of the following topics important to administrative adjudication: the removal of ALJs; the constitutionality of video hearings; administrative subpoenas; aggregate agency adjudication in federal court; and the due process rights of private parties under an agency regulation.

Next, the authors move on to adjudication developments in the agency context. Similar to the discussion noted above, the authors take additional time to discuss further the constitutional challenges to SEC administrative enforcement proceedings (i.e., ALJs are inferior officers that are not appointed in violation of the Appointments Clause). They suggest these challenges will continue to arise until the courts resolve them. Additionally, and like in last year’s chapter, the authors discuss the decisional independence of ALJs. In 2016, there was continued litigation before the Merit Systems Protection Board (MSPB), “which has exclusive authority to decide whether an agency has good cause to take adverse action against an ALJ.” The MSPB’s

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31. See *Adjudication*, infra at Part I.H. (discussing Shapiro v. SSA, 800 F.3d 1332 (Fed. Cir. 2015)).
32. See *Adjudication*, infra at Part I.I. (discussing E.F. Int’l Language Sch., 363 NLRB No. 20 (2015)).
33. See *Adjudication*, infra at Part I.J. (discussing NLRB v. Uber Tech., Inc., 216 F. Supp. 3d 1004 (N.D. Cal. 2016)).
36. See *Adjudication*, infra at Part II.A.
decision in Butler was the focus due to the Social Security Administration’s (SSA’s) disciplining of an ALJ for not providing interpreters upon request despite SSA internal policy and directives requiring such. 38 Finally, the authors explain the U.S. Department of Education’s newly established “process for the aggregation of ‘borrower defense claims’ under which group-wide relief may be provided.” 39 Once a group is identified, “the Secretary then designates a Department official to ‘present’ the group’s defense before a Department hearing officer.” 40

Lastly, the authors discuss two ACUS recommendations from 2016 relating to administrative adjudication. The first, Aggregation of Similar Claims in Agency Adjudication, "provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications." 41 The second, Evidentiary Hearings Not Required by the Administrative Procedure Act, 42 "suggests ways to ensure the integrity of the decisionmaking process; sets forth recommended pre-hearing, hearing, and post-hearing practices; and urges agencies to describe their practices in a publicly accessible document and seek periodic feedback on those practices." 43

CHAPTER 2: CONSTITUTIONAL LAW AND SEPARATION OF POWERS

Professor Bill Funk’s Constitutional Law and Separation of Powers chapter reviews the major constitutional law cases from the Supreme Court’s 2015 term, previews the ones pending in the 2016 term, and examines a few significant cases from the courts of appeals during the 2016 calendar year. He begins with the First Amendment. In Friedrichs v. California Teachers Association, 44 the Supreme Court split evenly (4–4), leaving a Ninth Circuit ruling intact. As

38. Adjudication, infra at 29–30.
40. 34 C.F.R. § 685.222(f)(2)(i).
discussed extensively in last year’s chapter,\textsuperscript{45} the Supreme Court in 2014 decided \textit{Harris v. Quinn},\textsuperscript{46} “an exception to the general rule established in \textit{Abood v. Detroit Board of Education},\textsuperscript{47} that the First Amendment does not bar requiring public employees from paying union dues that are used solely for the purposes of the union’s core collective bargaining activities.”\textsuperscript{48} \textit{Friedrichs} involved a First Amendment free speech and association challenge—through the Fourteenth Amendment—to California’s law requiring public school employees represented by a union under an exclusive bargaining agreement to join such union, or pay a fair share service fee related to collective bargaining activities. While there was a chance for the Court to overrule \textit{Abood} altogether in \textit{Friedrichs}, the case was decided after Justice Scalia’s death, resulting in a divided Court and \textit{Abood} as good law for the time being.

Next, Professor Funk discusses two Full Faith and Credit Clause decisions.\textsuperscript{49} The first, \textit{Franchise Tax Board of California v. Hyatt},\textsuperscript{50} involved a Nevada resident who brought a suit against the California Tax Board for negligence and intentional tort in Nevada courts. Following trial and verdict against the California agency, the Nevada Supreme Court refused to apply to the agency California’s statutory cap on damages. The Supreme Court held that by refusing to apply to the California agency the same cap on damages that would be applied to Nevada agencies, Nevada exhibited a “policy of hostility to the public Acts”\textsuperscript{51} of California, violating the Full Faith and Credit Clause. The second decision, \textit{V.L. v. E.L.},\textsuperscript{52} involved EL, the birth parent of three children, and VL, her partner who became a legal parent of the children through a Georgia court final decree. Once their relationship ended in Alabama, “VL brought suit in Alabama family court asking it to register the Georgia adoption judgment and seeking custody or scheduled visitation rights,” but the “Alabama Supreme Court denied this on the grounds that it need not give Full Faith and Credit to the Georgia adoption judgment because the Georgia court lacked subject matter jurisdiction to make such a judgment.”\textsuperscript{53}

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\item \textsuperscript{45} See William Funk, \textit{Constitutional Law and Separation of Powers, in Developments 2015}, supra note 20, at Part II.
\item \textsuperscript{46} 134 S. Ct. 2618 (2014).
\item \textsuperscript{47} 431 U.S. 209 (1977).
\item \textsuperscript{48} \textit{Constitutional Law and Separation of Powers, infra} at 37.
\item \textsuperscript{49} \textit{Constitutional Law and Separation of Powers, infra} at Parts I.B. and I.C.
\item \textsuperscript{50} 538 U.S. 488 (2003).
\item \textsuperscript{51} Carroll v. Lanza, 349 U.S. 408, 413 (1955).
\item \textsuperscript{52} 136 S. Ct. 1017 (2016) (per curiam).
\item \textsuperscript{53} \textit{Constitutional Law and Separation of Powers, infra} at 40 (discussing \textit{V.L. v. E.L.}, 136 S. Ct. at 1019).
\end{itemize}
The Supreme Court held that the Full Faith and Credit Clause “precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based.” Accordingly, the Alabama Supreme Court erred by not recognizing the Georgia decree, which under Georgia law, “gave the court in question ‘exclusive jurisdiction in all matters of adoption.’”

Professor Funk then discusses *Caetano v. Massachusetts*, a *per curiam* Supreme Court decision involving the Second Amendment. The Massachusetts Supreme Court had upheld a Massachusetts law banning the possession of stun guns, finding, among other things, that the Second Amendment did not apply because stun guns “were not in common use at the time the amendment was adopted.” The Massachusetts court decision contradicted an earlier Supreme Court decision, *District of Columbia v. Heller*, which held that the Second Amendment applied to “even those [arms] that were not in existence at the time of the founding.” Accordingly, the Supreme Court vacated and remanded the state court decision.

Professor Funk moves on to a significant case from 2016 regarding access to obtaining abortions: *Whole Woman’s Health v. Hellerstedt*. Here, the Supreme Court struck down two Texas laws—one “requiring doctors who perform abortions to have admitting privileges at a hospital within thirty miles of where the abortion is performed,” and another “requiring abortion facilities to meet the minimum state standards for ambulatory surgical centers.” The Court, relying on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, found that both requirements imposed a significant burden or obstacle on women seeking an abortion. Professor Funk notes that this is the first Supreme Court abortion decision since *Gonzales v. Carhart* in 2007. He highlights important features of the decision, including Justice Kennedy

57. See *Constitutional Law and Separation of Powers*, infra at Part I.D.
60. Id. at 582.
joining the majority, which was “a little surprising in light of his opinion for the Court in Gonzales v. Carhart\textsuperscript{64} and his dissenting opinion in Stenberg v. Carhart,\textsuperscript{65} in both of which he stressed the need for courts to defer to legislatures in cases of medical uncertainty.”\textsuperscript{66}

Two other 2016 Supreme Court decisions Professor Funk details dealt with the “One Person, One Vote” doctrine. Professor Funk explains that “\[u\]nder existing case law, as long as the population deviation between non-federal legislative districts does not exceed 10 percent, the districting presumptively satisfies the requirement for one person/one vote.”\textsuperscript{67} The first case, Evenwel v. Abbott,\textsuperscript{68} involved a challenge to Texas’s districting map, which had a deviation of less than 10 percent when total population numbers were used, but more than a 40 percent deviation when measuring registered voter population between districts. The Supreme Court held that the constitutional requirement that districts are drawn based on total population—“intended to protect equal representation, not voting equality”—was met in Texas and the state therefore did not violate the Equal Protection Clause.\textsuperscript{69} In the second case, Harris v. Arizona Independent Redistricting Commission,\textsuperscript{70} the Court upheld a districting plan in Arizona created after the 2010 census that had an 8.8 percent deviation. Again, the Court found that “[b]ecause the deviation was less than 10 percent, under existing precedent the districting presumptively met the one person/one vote requirement.”\textsuperscript{71}

Next, Professor Funk offers an extensive discussion of one last case from the Supreme Court’s 2015 term regarding affirmative action: Fisher v. University of Texas at Austin.\textsuperscript{72} The University of Texas denied admission to Abigail Fisher, who then sued the institution, arguing it violated the Equal Protection Clause by discriminating against her (and other Caucasian applicants) by considering race in a “holistic review” of applications for admission. The Supreme Court upheld the University’s program considering race in admissions, determining that the program satisfied strict scrutiny. Professor Funk points out an important aspect of the Court’s decision:

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  \item \textsuperscript{64} 550 U.S. 124 (2007).
  \item \textsuperscript{65} 530 U.S. 914 (2000).
  \item \textsuperscript{66} \textit{Constitutional Law and Separation of Powers}, infra at 45.
  \item \textsuperscript{67} \textit{Constitutional Law and Separation of Powers}, infra at 45.
  \item \textsuperscript{68} 136 S. Ct. 1120 (2016).
  \item \textsuperscript{69} \textit{Constitutional Law and Separation of Powers}, infra at 46.
  \item \textsuperscript{70} 136 S. Ct. 1301 (2016).
  \item \textsuperscript{71} \textit{Constitutional Law and Separation of Powers}, infra at 47.
  \item \textsuperscript{72} \textit{See Constitutional Law and Separation of Powers}, infra at Part I.H. (discussing 136 S. Ct. 2198 (2016)).
\end{itemize}
The Court then noted that the University’s program was “sui generis” in that the consideration of race only occurred in 25 percent of admissions and that when the case was brought there was little experience with the new program, so information that might shed more light on the whether the program was narrowly tailored was not available. Accordingly, the Court said the case may have limited precedential value. Moreover, precisely because more data will be generated concerning experience with the program, the University has a “continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances.”

Next in his chapter, Professor Funk turns to a series of cases before the Supreme Court in the 2016 term; in these cases, the Court had granted certiorari but had not issued decisions at the time the chapter was written. The first case, *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, concerns whether the Missouri Department of Natural Resources’ denial of a grant to Trinity Lutheran Church for purchasing recycled car tires to resurface the church’s preschool and daycare’s playground due to a prohibition in the Missouri Constitution violated the church’s rights under the Establishment, Free Exercise, and Equal Protection Clauses of the Constitution. The second case is the Supreme Court’s grant of certiorari in *Expressions Hair Design v. Schneiderman* due to a split among the circuits on whether prohibiting merchants from imposing surcharges for credit card payments violated the First Amendment by restricting speech. “Like the Second Circuit [in Expressions], the Fifth Circuit also had found a state ban on credit card surcharges to be economic activity, not speech, but the Eleventh Circuit held to the contrary, finding Florida’s equivalent law to be an unconstitutional restriction on commercial speech.” The third and fourth cases also concern free speech—one challenging the PTO’s ban on registering scandalous, immoral, or disparaging marks and the other on whether North Carolina’s law banning “the use

73. See Constitutional Law and Separation of Powers, infra at 49 (quoting Fisher, 136 S. Ct. at 2209-10).
74. 136 S. Ct. 891 (2016).
75. See Constitutional Law and Separation of Powers, infra at Part II.A.
76. 808 F.3d 118 (2d Cir. 2015).
77. See Rowell v. Pettijohn, 816 F.3d 73 (5th Cir. 2016).
78. See Dana’s R.R. Supply v. Attorney Gen., Fla., 807 F.3d 1235 (11th Cir. 2015).
79. See Constitutional Law and Separation of Powers, infra at Part II.C. (discussing In re Tam, 808 F.3d 1321 (Fed. Cir. 2015)).
of commercial social networking websites by registered sex offenders, both on its face and as applied” violated a registered sex offender’s First Amendment rights of speech and association. And the last two cases Professor Funk offers involve a challenge to existing Wisconsin zoning laws as a regulatory taking of real property, and an Equal Protection challenge to the Immigration and Nationality Act of 1952 for gender discrimination because the law treats the citizenship of children born abroad and out of wedlock to unwed U.S. citizen fathers differently than mothers.

Finally, Professor Funk discusses a string of lower court decisions—two are highlighted here—and any related Supreme Court precedent. The discussion of Amtrak and the Federal Railroad Administration’s (FRA’s) jointly developed “metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations” under the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) continues in a 2016 D.C. Circuit opinion, Association of American Railroads v. Department of Transportation. Like in its 2013 decision, the court again held that section 207 of PRIIA was unconstitutional but this time because the law permits Amtrak’s involvement in regulating its competitors, violating Due Process, and its schema for appointing an arbitrator when Amtrak and FRA cannot agree on metrics and standards violated the Appointments Clause.

Next, and as discussed earlier in his chapter, Professor Funk provides extensive discussion on the topic of SEC ALJs and whether their appointments are unconstitutional. Professor Funk outlines two conflicting lower court decisions—also discussed in the Administrative Adjudication chapter highlighted above—that will “ensure that the issue will come to the Supreme Court” before long: “In Raymond J. Lucia Companies, Inc. v. SEC, the D.C. Circuit held that ALJs are employees, not officers, but in Bandimere v. SEC, the Tenth Circuit concluded that they are inferior officers.” We look forward to

80. See Constitutional Law and Separation of Powers, infra at Part II.D. (discussing State v. Packingham, 777 S.E.2d 738 (N.C. 2015)).
82. See Constitutional Law and Separation of Powers, infra at Part II. E. (discussing Morales-Santana v. Lynch, 804 F.3d 520 (2d Cir. 2015), cert. granted, 136 S. Ct. 2545 (2016)).
84. 821 F.3d 19 (2016).
85. See Ass’n of Am. R.R. v. Dep’t of Transp., 721 F.3d 666 (D.C. Cir. 2013).
86. Constitutional Law and Separation of Powers, infra at Part III.A.
87. Constitutional Law and Separation of Powers, infra at III.B. (internal citations omitted).
the resolution of this split, which will surely be a topic of discussion in future editions of Developments.

CHAPTER 3: JUDICIAL REVIEW

Again this year, Professors Linda Jellum and Richard (“Chip”) Murphy work together in the chapter on Judicial Review to offer readers an extensive discussion of major decisions in 2016 relating to the scope of review of agency action and administrative law doctrines governing access to the courts.

Before diving into her section, Professor Jellum reports on legislative developments in 2016 involving scope-of-review doctrines. She states that judicial deference in 2016 was “under legislative attack,” with “conservative members of both the U.S. House of Representatives and Senate introduc[ing] companion bills to legislatively overrule Chevron and Auer deference. While not specifically targeted, Skidmore deference would also be a casualty of these bills.” The House version of the Separation of Powers Restoration Act of 2016 would have amended the Administrative Procedure Act (APA) so that courts must “decide de novo all relevant questions of law, including the interpretation of constitutional and statutory provisions, and rules made by agencies.” While neither the Senate nor the House versions made their way to the President in the 114th Congress—in part due to the Obama administration’s veto threat—it is unclear what would happen today with Republicans in control of both Chambers and the White House.

Turning to judicial developments, Professor Jellum notes that “[t]he Supreme Court’s jurisprudence regarding judicial review for 2016 [was] mostly unexciting.” She starts with Chevron deference developments. In Encino Motorcars, LLC v. Navarro—a case also discussed in this year’s chapter on Rulemaking—a service advisor sued their employer Encino Motorcars for overtime pay. Their suit followed issuance of a 2011 U.S.
Department of Labor (DOL) final regulation that reinstated the agency’s original regulation from 1970, interpreting that an exemption from the Fair Labor Standards Act’s overtime compensation requirement did not apply to “service advisors.” While the Supreme Court might have applied *Chevron* deference since DOL interpreted the Act via notice-and-comment rulemaking, it ultimately struck down the regulation as “procedurally defective” because DOL offered “barely any explanation” for its 2011 rule abandoning “its decades-old practice of treating service advisors as exempt.” The Court held that DOL’s action was arbitrary and capricious and that the regulation could not carry the force of law. Professor Jellum explains in her analysis why she believes the Court’s majority erred in its rationale and provides extensive analysis of how legal scholars have interpreted the decision. She cautions readers not to read too much into the decision in terms of whether arbitrary and capricious review is embedded in step-two of a *Chevron* analysis as some scholars suggest.

With respect to *Auer* deference developments in 2016, Professor Jellum discusses the Supreme Court’s grant of certiorari in *G.G. v. Gloucester County School Board*. The case involves a school board bathroom policy requiring transgender students “to use private alternative restroom facilities rather than the gendered restrooms” that was adopted after complaints were received concerning plaintiff, a transgender high school male, who was using boys’ restrooms without incident. The school board was challenged for not providing “transgender students access to restrooms congruent with their gender identity” in violation of Title IX of the Education Amendments of 1972 and the Equal Protection Clause (Fourteenth Amendment). At the center of the debate is a 2015 U.S. Department of Education opinion letter interpreting its own regulation and stating, “A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity.” *G.G.* (and the U.S. government as amici) asserts that the agency’s interpretation of its own regulation is entitled

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97. Id. at 2125.
98. *Judicial Review*, infra at 82.
100. 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016).
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to Auer deference, which “requires that an agency’s interpretation of its own ambiguous regulation be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute.103 [But] [i]f a regulation is unambiguous, Auer is not appropriate.”104 Professor Jellum reminds readers that in the 2015 Perez v. Mortgage Bankers Association105 decision, “Justices Scalia, Alito, and Thomas in a concurrence suggested that Auer deference should be jettisoned altogether.”106 Auer deference is safe for the moment though as the Supreme Court declined to grant certiorari on the petition’s question asking whether the Auer doctrine should be retained at all.

Next, Professor Jellum discusses FERC v. Electric Power Supply Association,107 a Supreme Court decision addressing arbitrary and capricious review.108 In this case, the Court upheld a Federal Energy Regulatory Commission (FERC) regulation that incentivized “retail customers to reduce electricity consumption by buying electricity on the wholesale rather than the retail market.”109 Petitioners included several energy industry associations; they challenged the FERC’s regulation as encroaching “on the states’ exclusive statutory jurisdiction under the Federal Power Act (FPA) to regulate the retail market.”110 The Court reversed the D.C. Circuit’s opinion vacating the rule, finding that the FPA provides the FERC with the authority necessary to regulate in this area and that the FERC’s actions were not arbitrary and capricious due to its detailed explanation supporting its actions. On the latter finding, the Court noted that the arbitrary and capricious standard—requiring the upholding of an agency rule that has looked at relevant considerations and provides satisfactory explanation for the agency’s action—is “narrow,” and the Court afforded “great deference to the Commission in its rate decisions” due to their technical nature.111

Finally, Professor Jellum discusses two lower court decisions involving deference doctrines: Gutierrez-Brizuela v. Lynch112 and Foster v.

103. Auer, 519 U.S. at 461.
104. Judicial Review, infra at 84.
105. 135 S. Ct. 1199 (2015). This case was discussed and analyzed extensively in the 2015 edition of Developments.
108. See Judicial Review, infra at Part II.C.
110. Judicial Review, infra at 86 (discussing FERC, 136 S. Ct. at 786).
111. Judicial Review, infra at 87 (discussing FERC, 136 S. Ct. at 782).
112. 834 F.3d 1142 (10th Cir. 2016).
The Gutierrez-Brizuela case involves the Tenth Circuit’s review of a Board of Immigration Appeals (BIA) order in an opinion Professor Jellum simply calls a “mess.” Professor Jellum works her way through the complex layers of the opinion, finding ultimately that Tenth Circuit panel’s decision was inconsistent with the Supreme Court’s Brand X decision, where the Court “held that the agency’s interpretation is ‘authoritative’ where . . . there is statutory ambiguity and the agency’s interpretation is reasonable.” The Foster case involves the Eighth Circuit’s affording to an agency a “second level of Auer deference”—Auer deference to “an agency’s interpretation of a guidance document, rather than to an agency’s interpretation of its own regulation.”

In his section on access to the courts, Professor Murphy discusses 2016 decisions addressing various administrative law doctrines, including constitutional standing, mootness, mandamus, exhaustion of remedies, limitations periods, reviewability, finality, and immunity.

For constitutional standing, Professor Murphy discusses six cases. Two are particularly worth noting here. In Spokeo, Inc. v. Robins—also discussed in last year’s Judicial Review chapter—the Supreme Court vacated the Ninth Circuit’s decision for misapplying the “concreteness requirement that injuries must satisfy to provide a basis for constitutional standing. The Court stressed that injuries must be both ‘concrete and particularized’”—the lower court did not analyze the former. In his discussion of Food & Water Watch, Inc. v. Vilsack, Professor Murphy states that the decision “may provide useful ammunition for defendants seeking dismissal in cases where a plaintiff bases constitutional standing on a risk of future harm.” The D.C. Circuit has held that to base standing on a risk of harm, the plaintiff must show “(i) a substantially increased risk of harm and (ii) a substantial probability of harm with that increase taken into account.”

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113. 820 F.3d 330 (8th Cir. 2016).
117. See Judicial Review, infra at Part III.A.
118. 136 S. Ct. 1540 (2016).
119. See Judicial Review, infra at 94 (quoting Spokeo, 136 S. Ct. at 1548 (emphasis in original)).
120. 808 F.3d 905 (D.C. Cir. 2015).
121. Judicial Review, infra at 97.
court affirmed a motion to dismiss because the plaintiffs’ allegations that new U.S. Department of Agriculture regulations authorizing “a new [poultry] inspection system that would increase the risk of foodborne illnesses due to consumption of contaminated poultry” did not “plausibly demonstrate a substantial increase in risk of harm.”

With regard to the mootness doctrine, Professor Murphy offers *Kingdomware Technologies, Inc. v. United States.* The case involved a challenge alleging that the U.S. Department of Veterans Affairs misapplied a statute favoring contracting with “service-disabled veteran-owned small businesses.” Professor Murphy states that “by the time the plaintiff’s claim for injunctive and declaratory relief regarding a particular contract had made it to the Supreme Court, the contract had been performed,” and no longer did a live controversy exist. While this would normally mean the case was moot, the Supreme Court held it to be an “exceptional situation” warranting exception to the mootness doctrine because the controversy was one “capable of repetition, yet evading review.”

Next, Professor Murphy discusses *American Hospital Association v. Burwell,* another 2016 D.C. Circuit decision involving a mandamus action. Due to congressional directives tugging the U.S. Department of Health and Human Services (HHS) in different directions, the Office of Medicare Hearings and Appeals had found itself with a backlog of more than 800,000 appeals of denials of claims for Medicare reimbursement. Several hospitals sued in federal court under 28 U.S.C. § 1361, seeking mandamus to compel HHS to start meeting statutory deadlines for its reviews of these denials. The D.C. Circuit disagreed with the lower court, finding the plaintiffs met the three threshold jurisdictional requirements for mandamus: “(1) a clear and indisputable right to relief, (2) that the government agency or official is violating a clear duty to act, and (3) that no adequate alternative remedy exists.” The court remanded the case for the district court to now turn to the

123. *See Judicial Review, infra* at 97 (discussing *Food and Water Watch, 808 F.3d* at 914).
125. *See Judicial Review, infra* at Part III.B.
126. *See Judicial Review, infra* at 104.
128. 812 F.3d 183 (D.C. Cir. 2016).
129. *See Judicial Review, infra* at Part III.C.
130. *Am. Hosp. Ass’n, 812 F.3d* at 190 (quoting *United States v. Monzel, 641 F.3d* 528, 534 (D.C. Cir. 2011)).
merits of the case, which requires application of the infamous TRAC factors to see if a writ of mandamus is justified.  

In an exhaustion of administrative remedies case, Ross v. Blake, Professor Murphy discusses the Supreme Court’s strong affirmance of the doctrine. The case involved a 42 U.S.C. § 1983 action against state prison guards for their treatment of an inmate; however, as raised in an affirmative defense, the Prison Litigation Reform Act of 1995 required the inmate first to exhaust his administrative remedies. The Fourth Circuit found that “special circumstances” excused the Act’s exhaustion requirements: the inmate had come to a “reasonable but mistaken conclusion that he had exhausted his remedies” when he reported his assault to the prison’s investigative unit, but had not used its established administrative remedy procedure. The Supreme Court rejected this because the Act stated categorically and clearly that administrative remedies must be exhausted before an action regarding prison conditions can be brought. The Court emphasized that “where ‘Congress sets the rules,’ courts can create exceptions ‘only if Congress wants them to.’” Because the Act requires only the exhaustion of available remedies though, the Court remanded the case to the lower court to consider whether there were limits on the availability of remedies present that may have excused the inmate from exhausting the prison’s established administrative remedy procedure first.

Professor Murphy then offers a discussion of cases involving statute of limitations periods. His discussion includes Menominee Indian Tribe of Wisconsin v. United States. In Menominee, a six-year statute of limitations applied to disputes over Indian Self-Determination and Education Assistance Act contracts. The Menominee tribe alleged that the Indian Health Service (IHS) underpaid the tribe under a contract during years beyond the limitations period (i.e., some of the tribe’s claims were more than six years old) but sought equitable tolling. The Court held that the tribe did not satisfy both elements required to establish a right to equitable tolling: “(1) that [the litigant] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.”

133. See Judicial Review, infra at Part III.D.
135. See Judicial Review, infra at 108.
137. 136 S. Ct. 750 (2016).
138. Id. at 755 (quoting Holland v. Florida, 560 U.S. 631, 649 (2010)).
In a follow up to his discussion in last year’s chapter on Judicial Review, Professor Murphy analyzes United States Army Corps of Engineers v. Hawkes Co., a finality case in which the Supreme Court resolved the circuit split concerning “waters of the United States.” As noted in last year’s chapter, the Fifth Circuit in Belle Co. v. U.S. Army Corps of Engineers ruled that a Corps jurisdictional determination (JD) “finding that land constituted wetlands subject to [Clean Water Act (CWA)] regulations did not amount to final agency action and was, therefore, unreviewable.” The Eighth Circuit came to an opposite conclusion, creating the circuit split. The issue before the Supreme Court then was whether a Corps’ JD was a final agency action that could be pursued under the APA; did a JD satisfy the Court’s Bennett v. Spear test for finality? Bennett requires: “First, the action must mark the consummation of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” While the government claimed a JD has no legal consequences (i.e., failing to satisfy the second prong), the Supreme Court held otherwise, finding a formal legal consequence exists because “issuance of a ‘negative JD’ blocks [the Corps and U.S. Environmental Protection Agency] from bringing enforcement actions for five years, creating a safe harbor for the landowner and altering the legal landscape. And a positive JD creates a legal consequence by denying this safe harbor.” No legal obligations are changed through a JD, but if a landowner with a positive JD discharges pollutants on its land, without a Corps permit, it may face penalties.

Lastly, Professor Murphy takes on immunity issues, discussing two Supreme Court decisions: Campbell-Ewald Co. v. Gomez and Mullenix v. Luna. Gomez involved a class action lawsuit alleging that Campbell-Ewald

139. See Developments 2015, supra note 20, at Part II.E.1.
140. 136 S. Ct. 1807 (2016).
141. See Judicial Review, infra at Part III.G.
143. See Developments 2015, supra note 20, at Part II.E.1.
146. Judicial Review, infra at 114.
147. Id.
Company had violated the Telephone Consumer Protection Act by sending text messages to recipients who had not “opted in” to receiving such solicitations. The Court found that the company—a government contractor—does not enjoy absolute “derivative sovereign immunity,”150 and, instead, is entitled only to a limited form. Mullenix involved an officer who, despite lack of training and a supervisor’s order to “stand by,” shot at a vehicle that officers had pursued, killing the man. The officer faced a § 1983 action for the use of excessive force in violation of the Fourth Amendment. The Supreme Court disagreed with the Fifth Circuit, finding that the officer was entitled to qualified immunity; the officer’s conduct, given the set of circumstances, met the Court’s standard of “not violat[ing] clearly established statutory or constitutional rights of which a reasonable person would have known.”151

CHAPTER 4: RULEMAKING

In his chapter on Rulemaking, Professor Bill Jordan calls calendar year 2016 “the calm before the storm of the Trump administration,” as there were no blockbuster judicial decisions on rulemaking in 2016, the outgoing Obama administration scurried to finish regulations so they did not fall within the Congressional Review Act’s grasp, and Congress did not enact rulemaking-related legislation.

Professor Jordan begins his extensive review of 2016 judicial developments with discussion of decisions on the adequacy of notices of proposed rulemaking (NPRMs). His discussion includes Zero Zone, Inc. v. U.S. Department of Energy,152 a case in which industry challenged a U.S. Department of Energy (DOE) NPRM imposing mandatory energy conservation standards on certain equipment, including commercial refrigeration equipment, claiming it did not receive “a meaningful opportunity for notice and comment” because DOE’s engineering spreadsheet that was used for its analysis was published only about a month before public comment ended.153 Because all of the relevant information was in fact available during the comment period—the spreadsheet was simply a tool to organize the information differently—the Seventh Circuit held that industry had all that it needed.154 Additionally,

150. Gomez, 136 S. Ct. at 671.
151. Mullenix, 136 S. Ct. at 308 (internal citation and quotation marks omitted).
152. 832 F.3d 654 (7th Cir. 2016).
153. Id. at 669.
154. Id. at 670.
DOE was not obligated to offer the spreadsheet in an alternative form that could be manipulated by manufacturers, as industry had argued.

Next, Professor Jordan discusses several cases highlighting the continued “struggle over guidance documents.” He starts with *Agricultural Retailers Association v. U.S. Department of Labor.* In this case, the Occupational Safety and Health Administration (OSHA) asserted that its newly announced definition to be used in its implementation of one of its standards was an interpretive rule and therefore exempt from notice and comment. The D.C. Circuit examined OSHA’s underlying statute, which required notice and comment for the agency’s promulgation or modification of its standards. Accordingly, the court held that the exemption under the APA for interpretative rules was irrelevant. The D.C. Circuit’s decision, according to Professor Jordan, was “extraordinary,” as it will not allow OSHA to issue, as it does currently, informal interpretations, as they would be subject to notice and comment. Next, Professor Jordan discusses three additional cases where the courts had to determine whether certain agency statements qualified as interpretive rules: *Tilden Mining Co., Inc. v. Secretary of Labor,* *Clarian Health West, LLC v. Burwell,* and *Texas v. United States.* These cases depict the courts’ struggle to make these determinations.

Professor Jordan then discusses an interesting Sixth Circuit decision, *Southern Forest Watch, Inc. v. Jewell,* in which the challenge before the court concerned an internal manual of the U.S. National Park Service (NPS). Such internal manuals, according to Professor Jordan, “create public expectations as to agency behavior and at times prompt challenges when agencies fail to follow their own manuals.” This occurred in *Southern Forest Watch* after NPS conducted public engagement before imposing certain use fees, but opponents to these fees alleged NPS did not comply with all “detailed steps” embedded in an agency reference manual. The Sixth Circuit disagreed with this argument, finding (1) that the manual was not intended to be bind-

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155. See *Rulemaking,* infra at Part I.B.
156. 837 F.3d 60 (D.C. Cir. 2016), *reh’g en banc denied* (Dec. 20, 2016).
157. *Id.* at 65.
158. See *Rulemaking,* infra at 127.
159. 832 F.3d 317 (D.C. Cir. 2016).
162. 817 F.3d 965 (6th Cir. 2016), *reh’g en banc denied* (May 9, 2016).
163. See *Rulemaking,* infra at Part I.C.
ing based on consistent assertions by NPS that the manual’s statements were not to be and (2) that such operating manuals “do not carry the force of law, bind the agency, or confer rights” as it did not go through the notice and comment rulemaking process. While the latter part of the Sixth Circuit’s reasoning regarding informal agency statements seems straightforward, Professor Jordan outlines for readers the two caveats in which the proposition may not hold true.166

Three more noteworthy decisions detailed in the *Rulemaking* chapter came out of D.C. federal courts in 2016.167 Professor Jordan first discusses the D.C. District Court’s *Metlife, Inc. v. Financial Stability Oversight Council* decision and the D.C. Circuit’s *Zero Zone, Inc.* decision, which offer “[t]he lesson . . . that agencies must not ignore costs [during decisionmaking] in the absence of specific statutory provisions authorizing them to do so. And the costs to be considered [can] range quite widely from the effects on regulated industry to the social costs, including global costs, of whatever harms agencies seek to address.”168 He then discusses *Natural Resources Defense Council v. U.S. Nuclear Regulatory Commission,* a case addressing what happens if an agency rulemaking used to decide a general factual issue for future adjudications becomes outdated.169 While new and significant information may have arisen between the Nuclear Regulatory Commission’s (NRC’s) issuance of a legislative rule in 1996 and the present, the court was able to reconcile the issue because the NRC’s own procedural regulations provided for the possibility of waiving the rule if certain factors were met.170 Professor Jordan submits that an agency “must have some mechanism for considering factual changes after the issuance of a rule that resolves factual issues for later adjudications . . . [such as] a waiver or other non-hearing mechanism to determine whether the information justifies departure from the rule.”171

Additional 2016 decisions on which Professor Jordan opines include: *National Biodiesel Board v. EPA,* a D.C. Circuit decision upholding a U.S.

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165. *Southern Forest Watch,* 817 F.3d at 972.
166. *Rulemaking,* infra at 133.
167. *See Rulemaking,* infra at Part I.E.
170. 823 F.3d 641 (D.C. Cir. 2016).
171. *See Rulemaking,* infra at Part I.F.
172. *NRDC,* 823 F.3d at 654.
173. *Rulemaking,* infra at 139.
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Environmental Protection Agency (EPA) adjudication that applied new substantive standards to a large number of licensees despite a challenge that the agency should have used rulemaking for this;\footnote{175 See Rulemaking, infra at Part I.G.} Regents of the University of California v. Burwell\footnote{176 155 F. Supp. 3d 31 (D.D.C. 2016).} and Siding and Insulation Co. v. Alco Vending, Inc.,\footnote{177 822 F.3d 886 (6th Cir. 2016).} two cases in which the courts of appeals had to determine whether the agency rules at issue were impermissibly retroactive;\footnote{178 See Rulemaking, infra at Part I.H.} Tennessee v. FCC,\footnote{179 832 F.3d 597 (6th Cir. 2016).} a Sixth Circuit decision rejecting the Federal Communications Commission’s attempt to preempt state authority (based on broad grants of authority) without “a clear directive from Congress” authorizing preemption;\footnote{180 See Rulemaking, infra at Part I.I.} and Wal-Mart Distribution Center #6016 v. OSHA,\footnote{181 819 F.3d 200 (5th Cir. 2016).} a Fifth Circuit decision that Professor Jordan states “illustrates the interplay between the substantial deference given to agency interpretations of their own regulations and the due process requirement for adequate notice before one may be punished for a violation of a regulation.”\footnote{182 See Rulemaking, infra at Part I.J.}

In addition to the judicial developments in rulemaking, Professor Jordan highlights some of the key administrative developments in his chapter.\footnote{183 See Rulemaking, infra at Part II.} This includes discussion of President Obama’s final push to fulfill his regulatory agenda in 2016 before the Congressional Review Act deadline; the Office of Management and Budget’s statutorily required annual reports to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act; and ACUS’s 2016 recommendation on “The Use of Ombuds in Federal Agencies” and three projects involving rulemaking.

Finally, Professor Jordan discusses the several legislative developments in rulemaking in 2016. This includes discussion of the enacted Evidence-Based Policymaking Commissions Act of 2016,\footnote{184 See Pub. L. No. 114-140, 130 Stat. 317 (2016).} an act providing for a bipartisan appointed commission to “conduct a comprehensive study of the data inventory, data infrastructure, database security, and statistical protocols related to federal policymaking and the agencies responsible for maintaining that data,” which will ultimately lead to recommendations on those and other
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Professor Jordan asserts that the commission’s recommendations “should be highly influential, particularly in a Republican administration.” He then highlights seven proposals that passed the House of Representatives (but not the Senate) in 2016 that attempted to alter the regulatory process. According to Professor Jordan, the most dramatic of those introduced was the Regulations From the Executive in Need of Scrutiny (REINS) Act, which would have required Congress to approve all major regulations and create a procedure for congressional approval of non-major regulations as well. He then details a double-digit list of other proposals in 2016 seeking to alter the federal regulatory landscape that were introduced or reported by congressional committees, but not passed by either Chamber. Professor Jordan concludes his chapter with discussion of what may come in 2017, including the review and rejection of Obama administration rules under the Congressional Review Act and legislative proposals that may move now given that Republicans control both Congress and the White House.

CONCLUSION

The four substantive chapters previewed above will certainly offer practitioners in administrative law, and even those with a mere interest in the area, an understanding of the developments in the field in 2016, as well as insight into where it may head in 2017. I would be remiss if I did not mention the four additional 2016 Developments chapters also devoted to substantive areas of administrative law and regulatory practice and available in eBook version on the ABA’s website. These include: a chapter on Government Information and Privacy, authored by Professor Bernard W. Bell; a chapter on Education, co-authored by Professor Caroline B. Newcombe and Will Creeley; a chapter on Intergovernmental Relations, co-authored by Jeffrey B. Litwak and T. Jaren Stanton; and a chapter on Food and Drug Law, co-authored by Professor Katharine Van Tassel, Professor Jim O’Reilly, John Johnson, and Edgar J. Asebey. These thorough and engaging chapters provide excellent

185. Id. at § 4(a)(3).
186. Rulemaking, infra at 149.
187. See Rulemaking, infra at III.B.
189. See Rulemaking, infra at Part III.B.2.
190. See Rulemaking, infra at Part III.B.3.
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_overviews of those important and interesting areas of regulatory law and all are absolutely worth downloading._

It is my hope that both the new and faithful readers of _Developments_ enjoy this edition and the accompanying e-chapters!

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May, 2017