Administrative & Regulatory Law News

Section of Administrative Law & Regulatory Practice

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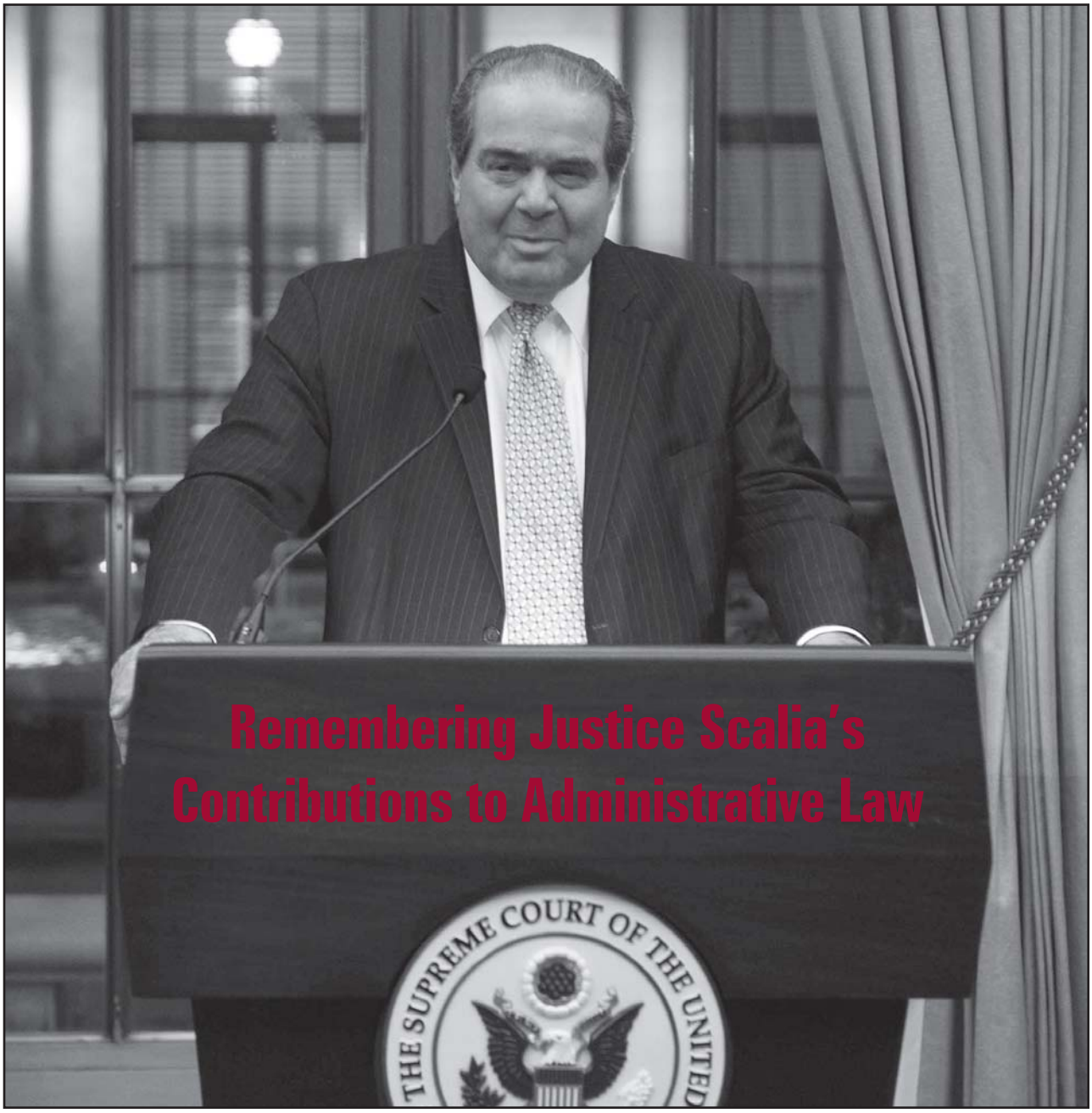

Remembering Justice Scalia's Contributions to Administrative Law

Also In This Issue

Congratulations, Supreme Court Nominee Merrick Garland!

Congress and the New Department of Labor Fiduciary Rule

Regulation of the Sharing Economy

Upcoming Section Events

ABA ANNUAL MEETING
San Francisco, California
Locations TBD

Section Council Meeting & Elections
Saturday August 6, 2016
8 am–4 pm

Section Dinner
Saturday August 6, 2016
6:30–9:30 pm

11TH ANNUAL HOMELAND SECURITY LAW INSTITUTE
Wednesday, August 24, 2016–
Thursday, August 25, 2016
Walter E. Washington Convention Center,
Washington, DC

FY2017 EVENTS

FALL SECTION COUNCIL MEETING & SECTION DINNER
Mid-Late October
Dates TBD
Washington, DC

ADMINISTRATIVE LAW CONFERENCE
Thursday, December 8–
Friday, December 9, 2016
Walter E. Washington Convention Center, Washington, DC

MID-YEAR SECTION COUNCIL MEETING
February 2017
ABA Mid-Year Meeting
Miami, FL

13TH ANNUAL ADMINISTRATIVE LAW & REGULATORY PRACTICE INSTITUTE
March 2017
Dates TBD
Washington, DC

SPRING SECTION COUNCIL MEETING & DINNER
Late April–Early May
Dates TBD
Washington, DC

12TH ANNUAL HOMELAND SECURITY LAW INSTITUTE
Dates & Location TBD

ANNUAL SECTION COUNCIL MEETING, MEMBERSHIP MEETING & ELECTIONS & SECTION DINNER
Saturday August 12, 2017
ABA Annual Meeting
New York, NY

Front cover: ***Justice Antonin Scalia speaks in December 2014 at the 50th Anniversary Reception for the Administrative Conference of the United States.***

Chair's Message

Jeff Rosen

Presenting programs about administrative law and the regulatory process is one of the core roles of the Section, and, as reported elsewhere in this issue, there have been some outstanding ones to date. In addition, our 12th Annual Administrative Law & Regulatory Practice Institute in Washington, D.C. on March 14-15 had a stellar roster of speakers, as did our joint program with the Hoover Institute on March 16 about "Sixty Years of Regulatory Reform: The Hoover Commission Report of 1955 and Lessons for Current Proposals". We also have revived a longtime practice of having highly-respected guest speakers at our quarterly Council meetings. At the recent meeting in New York on January 9 we were fortunate to hear from Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, and from Roger Nober, the Executive Vice-President for Law and Corporate Affairs for the BNSF Railway, both of whom have deep experience in administrative law from experience in and preceding their current positions. At our most recent Council meeting in Washington, D.C. on March 12, we were fortunate to hear from Judge Thomas Griffith of the U.S. Court of Appeals for the D.C. Circuit, whose deep experience in administrative law includes having been a member of the Section's Council some years before he became a judge.

In February alone the Section held three exceptional teleforums for members (which are now available on the Section's website). One I want to highlight was sponsored by our Section's Education Committee on February 24, titled "Free Speech on Today's College Campus: Harassment, 'Microaggressions,' and the Ramifications of Regulation", which had three outstanding speakers, along with our Section's moderator, Will Creeley, who is himself an expert on these issues. It is a tremendously important topic, about which not enough attention has been paid. In a free society, demands to directly restrict free thought and expression ought to instantly raise eyebrows, and lawyers have a special responsibility to protect civil liberties. I have read of students at highly-regarded universities making assertions that free speech should yield to what they assert are "higher values"—to which I inevitably wonder if these students would go first and agree to themselves be silenced by others who take a different view of which values are "higher." If free speech is to be curtailed, how about making the advocates of restrictions themselves volunteer to be the first to be silenced?

What, you may ask, does the protection of free expression have to do with administrative law? Free speech issues arise in a remarkably wide range of agency regulatory contexts, and not just on college campuses. Obvious contexts arise at the FCC, such as regulation of indecent speech, and at the FEC, as with campaign communication restrictions. But free speech issues can arise from overbroad efforts to define harassment by agencies like the EEOC, or from FDA and USDA regulation of drug and food labels, or from DOL and NLRB rules compelling the content of posters by employers, or from DOT rules to impose airline disclosure requirements, or from NEA funding of the arts, for example. The Education Department has generated significant First Amendment issues regarding guidance about college speech codes, and about enforcement policies related to Title IX. Moreover, there are deeply troubling efforts by some groups or even public officials who seek to induce agencies like EPA or DOJ to punish those with dissenting views of controversial issues as a way to kill the marketplace of ideas and prevail by force or fiat.

Who within federal agencies is responsible to promote, preserve, and defend the fundamental right of American citizens to free thought and expression? Every lawyer ought to do it; no one is actually assigned specially to this critical concern. Administrative law as it has evolved in the last one-hundred years arose as a restraint on arbitrary government action, to protect the due process and liberty of citizens subject to governmental actions. Administrative lawyers should have an interest in ensuring that free speech—as the most basic and indispensable civil liberty undergirding a free society—is not curtailed by regulatory actions.

In a hopeful note as to how open discussion and a free exchange of views can sometimes result in consensus, I am very pleased to report that at the mid-year meeting of the ABA House of Delegates the ABA approved the Section's proposed resolution 106B calling for revisions to modernize the Administrative Procedure Act of 1946. (Before this, the Section most recently had proposed resolutions that were approved by the ABA in 2013 and 2011.) Special thanks go to Connor Raso and Jamie Conrad for their efforts and leadership of the process that enabled the Section's Council to come to consensus about the need to update the Administrative Procedure Act seventy years after its passage. Thanks also to our Section Delegates, Ronald Levin and Russell Frisby, who ably presented the resolution for consideration at the House of Delegates. For those interested in the resolution and report, they are posted on the Section's website at http://www.americanbar.org/groups/administrative_law/policy.html, and the resolution is reprinted in this issue at page 13. This new ABA policy calls for at least nine changes to the Administrative Procedure Act, and hopefully will receive careful attention in Congress as it considers legislation to modernize the APA.

I also want to highlight one other significant event from recent weeks: At the March 12 Council meeting the Section heard a moving remembrance and tribute about our former 1981-82 Section Chair, Justice Antonin Scalia, from one of his former law clerks, John O'Quinn (who currently chairs one of the Section's committees). The Section has expressed our deep sadness at Justice Scalia's passing and our condolences to his family, so I am pleased that John's tribute, and remembrances of Justice Scalia from two other former Section Chairs—Tom Susman and Boyden Gray—are included in this issue, at pages 4, 6, and 10. In addition to his impact in so many realms, Justice Scalia had an enormous impact on administrative law.

These remembrances again highlight the extraordinary role the Section has played in the key debates about administrative law and regulatory practice over many decades. Hopefully, the ABA's new resolution 106B will now make a similar contribution to today's dialogues about the regulatory state, adding to the legacy of those I have referenced in earlier columns in which the Section (and its predecessor committee) has aimed since the 1930's to help improve the regulatory process and the functioning of our government. Whatever one's particular policy views, improving the operation of government is surely a goal we can all share. I hope the Section will continue to provide a forum for discussing and writing about the issues, and for proposing consensus ways to address them. And, as noted above, I hope administrative lawyers and government agencies themselves will pay particular attention to the critical role that free thought and expression must play in a democracy and free society. As with the process of public notice and comment that is so vital to administrative law, let's have the dialogue continue.

Jeff Rosen
Chair, ABA Section of Administrative Law & Regulatory Practice

Table of Contents

Chair's Message 1
On Justice Scalia's Contributions to Administrative Law 4
Remembering Justice Scalia 6
ABA Administrative Law Section—Tribute to Justice Scalia 10
ABA House of Delegates Adopts Section Resolution to Modernize APA Rulemaking 13
Congratulations, Chief Judge Merrick Garland! 14
Congress and the New Department of Labor Fiduciary Rule 15
Regulation of the Sharing Economy: Uber and Beyond 17
Supreme Court News 19
Cases Potentially Impacted by Supreme Court Vacancy 21
News from the Circuits 24
News from ACUS: Administrative Conference Study: Self-Represented Parties in Administrative Hearings 28
Recent Articles of Interest 30

Administrative & Regulatory Law News

The Administrative & Regulatory Law News (ISSN 1544–1547) is published quarterly by the Section of Administrative Law & Regulatory Practice of the American Bar Association to provide information on developments pertaining to administrative and regulatory law and policy, Section news, and other information of professional interest to Section members and other readers.

The Administrative & Regulatory Law News welcomes a diversity of viewpoints. From time to time, the editors may publish articles on controversial issues. The views expressed in articles and other items appearing in this publication are those of the authors and do not necessarily represent the position of the American Bar Association, the Section of Administrative Law & Regulatory Practice, or the editors. The editors reserve the right to accept or reject manuscripts, and to suggest changes for the author's approval, based on their editorial judgment.

Manuscripts should be e-mailed to: **anne.kiefer@americanbar.org**. Articles should generally be between 1500 and 2500 words and relate to current issues of importance in the field of administrative or regulatory law and/or policy. Correspondence and changes of address should be sent to: ABA Section of Administrative Law & Regulatory Practice, 1050 Connecticut Avenue NW, Suite 400, Washington, DC 20036.

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On Justice Scalia's Contributions to Administrative Law

By Honorable C. Boyden Gray★

Justice Scalia by now has had a thoroughly deserved outpouring of comment both about his wonderful personality and his judicial brilliance. There is not much I can add to either, especially about him as a person. Suffice it to say that he was a most wonderful individual in almost every respect, as the service at the Mayflower Hotel amply illustrated. As Justice Breyer said to me afterwards, there was not a single wrong note in the entire presentation.

As a former Chair of the Ad Law Section of the ABA, to which Justice Scalia devoted so much of his attention (unfortunately before my tour of duty), I feel nevertheless a need to comment briefly on his contributions to administrative law, which I think was always his first love. Certainly he was viewed as the top expert by legions of lawyers who learned from him as law school students, as law clerks, or just as practitioners trying to master the subject.

Since his death, many experts have said that his legacy, beyond textualism and originalism, was the notion that courts should not decide matters committed to the elected branches of government. This in turn led him to strongly support the *Chevron* deference doctrine as a logical extension of his respect for Congress. The principle was that courts should not substitute their own policy judgment for that of an agency duly constituted to implement congressional directives.

He was in this context suspicious of the non-delegation doctrine, especially if it meant overturning an act of Congress. Essentially, the explanation of his rulings was that if Congress voluntarily wants to give away its authority, who are the courts to stop the Congress?

The point I want to make is that in the last few years I believe he was actively reconsidering this general view, in light of the separation of powers. I base this both on his opinions and on his speeches.

To be sure, Justice Scalia never supported unbounded delegation to agencies. Take his 9-0 opinion in *Whitman v. American Trucking Ass'ns*, for example, decided in 2001. The principal challenge in that case was that only application of cost-benefit analysis could save the EPA's virtually unlimited grant of authority to drive pollution from current levels all the way down to zero. Justice Scalia wrote that the Clean Air Act made no provision for cost-benefit analysis in the EPA standard setting (though he said that such analysis was appropriate at the state level where the standards are implemented). *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470-471 (2001).

> *"Essentially, the explanation of Justice Scalia's rulings is that if Congress voluntarily wants to give away its authority, who are the courts to stop the Congress?"*

Justice Scalia's opinion in *American Trucking* was viewed, incorrectly, as a total defeat for what little was left of the non-delegation doctrine, expressed for the last few decades as a canon of construction for interpreting statutes narrowly. What commentators overlooked was that Justice Scalia went on to invoke the non-delegation opinion of Chief Justice Rehnquist in the earlier *Benzene* case where the Chief Justice wrote that a health standard had to address a "significant risk," lest that statute violate the non-delegation doctrine because it encapsulated no limiting factors. *Id.* at 473-74.

As a result, Justice Scalia wrote, the Clean Air Act must do the same, and he quoted a narrowing interpretation of the Clean Air Act, proffered by the Solicitor General during oral argument, in order to limit the EPA's standards to achieving "no more than necessary" to provide for an adequate margin of safety. *Id.* at 473. This standard would have imperiled the ozone standard proposed by the Obama EPA in his first term, in connection with which the EPA acknowledged that the evidence supporting the proposal was "highly speculative"—a standard that could hardly meet a "necessary" or "significant" risk test. (The proposal was withdrawn before the election and later finalized in a much watered down form). Draft Regulatory Impact Analysis, Final Ambient Air Quality Standard for Ozone, at 19 (July, 2011), *available at* http://www3.epa.gov/ozonepollution/pdfs/201107_OMBdraft-OzoneRIA.pdf.

Perhaps equally importantly, Justice Scalia wrote that where the non-delegation doctrine was raised as a legitimate issue, the *Chevron* deference doctrine did not apply and the court had to decide how to interpret

★Former section chair Boyden Gray is founding partner of Boyden Gray & Associates, and was U.S. Ambassador to the European Union and U.S. Special Envoy to Europe for Eurasian Energy under President George W. Bush and White House Counsel to President George H.W. Bush.

the statute. *American Trucking Ass'ns*, 531 U.S. at 469.

This set of issues came back in a couple of recent cases involving the EPA, one addressing climate change and one addressing stationary source air toxics. In the former case, the EPA was claiming the authority to adjust the trigger for the application of certain rules from an emissions threshold posited by the EPA of 75,000 tons, to the actual statutory threshold of 100 tons, without any guidance, limitation or other restraint from Congress or the courts. Justice Scalia rejected the EPA's attempt to re-write the statute with one of his signature lines—"We are not willing to stand on the dock and wave goodbye as the EPA embarks on this multiyear voyage of discovery." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

In the air toxics case, the issue was whether cost-benefit analysis applied within the statutory requirement that the EPA's rule be "appropriate." The cost-benefit ratio in the case was very lopsided, with some $9.6 billion in costs (the rule was arguably the most expensive ever issued by any agency) and only about $4 to $6 million in direct benefits. Part of Justice Scalia's opinion says that cost is encompassed within the term "appropriate," but the opinion also went on to say that a cost-benefit disparity of that kind would likely be considered arbitrary and capricious in any event, even apart from the "appropriate" standard. *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015).

As these cases were being decided, Justice Scalia was delivering speeches expanding on the theme that the most solid protection for individual liberty was to be found in the structural aspects of the Constitution—that is, the separation of powers—rather than the bill or rights or even the principles of federalism. The downgrading of *Chevron* and the lift for the non-delegation doctrine in his recent opinions fits well with the theme in his most recent speeches about the separation of powers. Of course, we will never know how far Justice Scalia would have taken this combination. But perhaps there is a glimpse in the recent dissents of Justice Thomas, where he questions both deference and delegation. So it seems likely that the questions initially raised by Justice Scalia will continue to have a voice, the success of which obviously will depend in very significant part on what happens this November at the ballot box.

For the time being, we have Justice Scalia to thank for reconsidering doctrines that have been abused to support the uncontrolled growth of the Administrative State, so parting thanks to a wonderful Justice, and good luck to Justice Thomas, an equally generous and good human being.

Remembering Justice Scalia

*Thomas Susman**

The Funeral Mass for Associate Justice Antonin Scalia was a well-attended reunion of the ABA Section of Administrative Law and Regulatory Practice. Among those present were former Section Chairs (Paul Verkuil, Sally Katzen, Boyden Gray, Ron Cass, Dick Wiley, and me) and former Council Members (Hon. Stephen Breyer, Steve Williams, John Vittone, Ted Olson, Leonard Leo, and Susan Braden, among others). The gathering reminded me of the words of Shakespeare's play Henry IV "We few, we happy few, we band of brothers/sisters."

Nino Scalia had a rich and full life as husband, father, and grandfather; professor and government official; judge and justice and mentor to scores of clerks; hunter and fisherman; traveler and raconteur; opera aficionado and gourmand; and more. But, for now, I reflect on administrative law, the ABA, and our friend and colleague Nino.

Antonin Scalia's name first appeared in the ABA leadership "Redbook" for 1973-1974, as Agency Liaison to the Administrative Law Section from the Administrative Conference of the United States, which he chaired starting in 1972. But even before he chaired ACUS, he was an ACUS consultant and authored reports on the hearing examiner loan program and procedural aspects of the Consumer Product Safety Act. Neither resulted in ACUS recommendations.

During his term as ACUS chairman (1972-1974) the Conference developed a dozen recommendations to amend the Administrative Procedure Act that, in turn, were incorporated in the the work of the Section that emerged as resolutions to the ABA's House of Delegates. In 1973, Nino was named an *ex officio* Board Member of the Center for Administrative Justice, an organization sponsored by the Administrative Law Section and funded by the American Bar Foundation to develop research and promote education in state and federal administrative law.

Following his tenure as Chair of ACUS, Nino moved to the Office of Legal Counsel in the U.S. Department of Justice (just as his predecessor in both jobs, Roger Cramton, had done). He was not the first OLC Assistant Attorney General to remain active in the ABA. Both Frank Wozencraft and Bill Rehnquist were members of the Administrative Law Section Council, also while serving as Assistant Attorneys General. That tradition continued with John Harmon, Ted Olson, Walter Dellinger, and Beth Nolan.

As AAG for OLC, Nino did not forget his old friends at ACUS or in the ABA, and that relationship led to enactment of what Court of Appeals for the District of Columbia Judge Carl McGowan said, "Many would consider … to be the Conference's greatest achievement." The story began with a 1969 ACUS study. That study cataloged the routine success that the federal government had in having lawsuits against it dismissed on various "technical defenses," such as improper venue, improper naming of government defendants, the $10,000 amount in controversy for federal question cases, and the ancient doctrine of sovereign immunity still used in nonstatutory suits. (The sovereign immunity defense had been eliminated in contract and tort cases.) The study also recommended that such defenses be modified or repealed.

The ABA House of Delegates adopted resolutions, on the recommendation of the Administrative Law Section, calling for enactment of legislation to implement these ACUS recommendations. And an ABA witness testified in favor of the bills before the congressional hearings. But the Justice Department held the line, objecting to all of the proposals because they would weaken the government's ability to get cases thrown out of court, regardless of the merits of the suits.

AAG Scalia was able to work the inside game to persuade DOJ to back off its previously steadfast opposition to the legislation incorporating these ACUS resolutions/ABA recommendations. And they quickly became law. (Disclosure: I was counsel to the Senate Subcommittee that was responsible for developing that legislation and moving it through the 94th Congress.) During his term at DOJ, Nino remained Section Liaison from the Department to the Administrative Law Section.

Between his government service (ending in 1977) and appointment as a Judge of the U.S. Court of Appeals for the District of Columbia Circuit in 1982, Nino remained active in the Section as chair of its Nominating Committee and Judicial Review Committee and vice-chair of its Legislative Veto Committee (just a couple years before *Chada* was decided by the Supreme Court; you remember *Chada* don't you?). In 1981-1982, he was Section Chair and the next year chaired the Section Officers Conference.

One Section Council meeting under Nino's leadership stands out in my memory; it is a story I have told countless young lawyers to convey the excitement and opportunities open to lawyers active in the ABA. When I left Capitol Hill to enter the private practice of law in 1981, I built on my interest in and experience with the Freedom of Information Act to develop a series of proposed ABA

* *Director, ABA Governmental Affairs Office.*

resolutions. During the fall Section meeting, the Council adopted many of these recommendations, but left a particularly controversial one for future consideration. That consideration came at a Council meeting in Puerto Vallarta in the winter of 1982. What a sacrifice for a new Section member and his bride to have to travel to the beaches of Mexico to participate in a bar association meeting!

Nino presided as I made the case for clarifying exemption 1 of the FOIA to state specifically that when district courts review FOIA cases *de novo*, they should not, contrary to a growing body of judicial dicta, give deference to an agency decision to classify information in the interest of national security. The debate was heated, with Susman the chief proponent of the resolution. The opposition was spearheaded by—you guessed it—Chair Scalia. That the vote was extremely close provided scant comfort, for in the end the Chair prevailed and the resolution was rewritten to state that the legislation should be amended to provide explicitly that courts *should* give deference to agency classification decisions.

I might have guessed I would be outflanked by Nino on my FOIA recommendation, but it wasn't until a couple of months later that his broadside against that statute appeared in AEI's magazine. Entitled "The Freedom of Information Act Has No Clothes," the article, in classic Scalia eloquence, characterized the FOIA as "the Taj Mahal of the doctrine of unanticipated consequences, the Sistine Chapel of cost-benefit analysis ignored." Nino was never one to mince words.

After losing out to Rex Lee for appointment as Solicitor General of the U.S. in 1980, Nino was initially offered a seat on the federal appeals court in Chicago, but he turned it down. He was appointed to the U.S. Court of Appeals for the D.C. Circuit in 1982 and no doubt accepted that nomination with relish since, as is widely known amongst the administrative law bar, the D.C. Circuit is effectively the supreme court for administrative and regulatory appeals. While on the D.C. Circuit, he and former Section Council Member, then First Circuit judge, Stephen Breyer engaged in one of the Administrative Law Section's best-attended D.C. events: a "Great Debate" over the proper role of legislative history in interpreting federal statutes. The debate did not have a winner or loser.

Nino's disaffection with the ABA came shortly after he was confirmed as Associate Justice to the U.S. Supreme Court. A combination of two factors sealed his decision to drop his membership in the ABA and withdraw from participation in its events. The first was the (mistaken) allegation that the ABA was responsible for the failed nomination to the Supreme Court of Nino's friend and D.C. Circuit colleague, Robert Bork. (In fact, the 10-member majority of the ABA Standing Committee on the Federal Judiciary gave Judge Bork a "well qualified" rating, but it was widely reported that the Committee split with 4 members voting "not qualified" and one "not opposed." In the media, the ABA was tagged as the culprit responsible for sinking Judge Bork's nomination.)

The second reason for Nino's departure from the ABA was the association's adoption of resolutions supporting women's reproductive rights. He had consistently taken the position that, since the Constitution says nothing about abortion, states can permit or ban it based on the will of the voters. (Keep in mind that Nino characterized abortion rights as an "absolutely easy" case to decide: "Nobody ever thought the Constitution prevented restrictions on abortion," he once said.)

Fortunately, Nino's estrangement from the ABA was not permanent. He set the tone himself for returning to the fold when he responded to a student's question about *Bush v. Gore* by responding: "Get over it." I reminded him of that comment when I went to work at the ABA almost 8 years ago, and later asked him to host the 2012 ABA Grassroots Advocacy Awards Reception at the Court. He did so, and not only stayed for the entire event, but took the time to shake hands and warmly greet almost every lawyer and guest in attendance.

Ron Cass also helped shepherd Nino back into the ABA fold with a standing-room-only interview at the New Orleans Midyear meeting in 2012 and through participation in the ABA's International Legal Exchange (ILEX) program. Truth is, we were getting comfortable with and increasingly enthusiastic about Nino's return to ABA events as a regular.

Nino was an intellectual giant, with whom we might disagree, but always maintain respect. And he was a gregarious and warm-hearted friend. Books have been and will continue to be written about Associate Justice Scalia and his influence on the Court and on American jurisprudence. He certainly made his mark through his opinions, both majority and dissenting, in almost all corners of the law. But those of us in the administrative law world know that Nino had a special interest in this arcane field, as reflected in his professional career as law professor, researcher and writer, ACUS Chair, active ABA member, judge, and frequent speaker.

I referred at the beginning of this piece to the "hearty band" of those who include administrative law in our calling. And I do mean "hearty." For, as Nino himself said in an address to the Duke Law School on judicial deference in 1989, "Administrative law is not for sissies." I know many of us concur in that opinion, and will sorely miss our brother Nino.

Justice Antonin Scalia and retired Justice Sandra Day O'Connor confer in December 2014 at the 50th Anniversary Reception for the Administrative Conference of the United States.

OSHA Administrator David Morris Michaels, Justice Scalia.

Left to right: Former section chair Warren Belmar, House Committee on the Judiciary senior counsel Susan Jensen, Justice Scalia.

Left to right: Then-ACUS Chair Paul Verkuil, Justice Scalia, Justice Stephen Breyer.

ABA Administrative Law Section—Tribute to Justice Scalia

John C. O'Quinn★

It is my solemn honor to offer a resolution in memoriam for Justice Antonin Scalia on behalf of the ABA Section of Administrative Law, and to share a remembrance of the Justice. The loss to the country, to the Court, and to the law is truly immeasurable. I daresay we will not likely see one such as him again in our lifetimes. His impact on the law—particularly the approach to statutory interpretation—is unquestionable. He literally changed the rules of engagement. He joins a pantheon of truly great Supreme Court Justices whose opinions are timeless. His reasoning and intellect, coupled with his incomparable rhetorical flare, made him one for the ages. Can there be any doubt that 100 years from now students will still be studying the opinions of Justice Scalia?

I had the privilege of clerking for the Justice during October Term 2002. And from that vantage point, I can tell you without hesitation that every memorable line in a Scalia opinion came from the Justice himself. Although we as law clerks sometimes tried to imitate, we never came close. He had no use for legal jargon. He wanted to convey his ideas in a clear and concise way. If we said it in two sentences, he could get it down to one. His opinions were entirely, thoroughly, his by the time he was done with them.

Life in the Scalia chambers was as you might imagine it—he relished the banter with his law clerks. He was gregarious, he was fun. He enjoyed debate, discussion, and the craft of making an argument. He welcomed disagreement, and often commented that it made his opinions better—as iron sharpens iron. In short, the Scalia chambers were very lively and very thoughtful, much like his opinions.

The Justice will be long remembered for his opinions on constitutional and statutory interpretation. Today, however, I would like to focus on a lesser-known body of his work, but one that is particularly important to this Section, namely his administrative law jurisprudence. As I do, it seems fitting to recall, how the Justice once prefaced a lecture on administrative law: "Administrative law is not for sissies—so you should lean back, clutch the sides of your chairs, and steel yourselves for a pretty dull lecture." A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511, 511.

Although the Justice certainly needs no introduction to this body, let me start with his influential work in this field even before he joined the High Court. We have truly lost one of our own. Antonin Scalia was the Chair of this Section from 1981–1982, and chairman of the ABA's Conference of Section Chairs from 1982–1983. He served the Executive Branch as General Counsel of the Office of Telecommunications Policy from 1971–1972, and then Chair of the Administrative Conference of the United States from 1972–1974. He was Assistant Attorney General for the Office of Legal Counsel from 1974–1977, opining on the legality of various regulatory actions and proposals. The Justice was also a professor of law at the University of Virginia from 1967–1971, and at the University of Chicago from 1977–1982, where his work included administrative law. And, of course, he served for four years on the D.C. Circuit, where the wheelhouse is, of course, administrative law.

Given that history, it is no surprise to find Justice Scalia writing either the majority opinion, or a poignant dissent, in nearly every major administrative law case the Supreme Court has decided over the past 30 years. From the interpretation of *Chevron*, to the non-delegation doctrine, to the role of judges in reviewing administrative decisionmaking under the Administrative Procedure Act, the Justice has written on almost every topic in the field.

The Justice was an ardent defender of the *Chevron* doctrine and its approach to deference to agency interpretations of the statutes they administer. It is also noteworthy that this was an area where he and Justice Thomas did not always see eye-to-eye. In *Christensen v. Harris County,* 529 U.S. 576, 590 (2000), they disagreed over the deference due to the Department of Labor's position found in agency opinion letters. The majority applied *Skidmore* deference and found it to be lacking; Justice Scalia thought that to be an "anachronism." *Id.* at 589 (Scalia, J., concurring in part and concurring in judgment). That relatively minor disagreement boiled over in *United States v. Mead*, 533 U.S. 218 (2001), with Justice Scalia vigorously dissenting from what he viewed as a major retrenchment from the key precepts of *Chevron*: "We accord deference under *Chevron*… because of a presumption that *Congress*, when it left ambiguity in a statute, meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (*rather than the courts*) to possess whatever degree of discretion the ambiguity allows." *Id.* at 240 (Scalia, J., dissenting) (emphasis added). As the Justice explained, "[t]he doctrine of *Chevron*—that all

★ *Law Clerk to Hon. Antonin Scalia, 2002–2003; Partner, Kirkland & Ellis, LLP, Washington, D.C.*

authoritative agency interpretations of statutes they are charged with administering deserve deference—was rooted in a legal presumption of congressional intent, important to the division of powers between the Second and Third branches." *Id*. at 241 (emphasis added). *Mead*, thus, marked in his view, judicial aggrandizement of power under "th'ol' 'totality of the circumstances' test," at the expense of the Executive Branch, and would lead to ossification of the statutes agencies must apply. *Id*. at 241. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 1014 (2005) (Scalia, J., dissenting), he continued his criticism of what he called the Supreme Court's "administrative-law improvisation project," dissenting from Justice Thomas's majority opinion. He said the Court had solved the problem of "ossification of large portions of our statutory law … by inventing yet another breathtaking novelty: judicial decisions subject to reversal by executive officers." *Id*. at 1016. "It is indeed a wonderful new world that the Court creates, one full of promise for administrative law professors in need of tenure articles and, of course, for litigators." *Id*. at 1019.

The Justice was also quick to defend an agency's right to change its mind, without subjecting that to more rigorous scrutiny than the agency's original decisionmaking would have been. In his *Mead* dissent he explained that "[w]here *Chevron* applies, statutory ambiguities remain ambiguities subject to the agency's ongoing clarification. They create a space, so to speak, for the exercise of continuing agency discretion." 533 U.S. at 247. An agency can interpret a provision, "can later replace that interpretation … and if that proves undesirable can return again to the original interpretation." *Id*. Similarly, writing for the majority in *FCC v. Fox Television*, 129 S. Ct. 1800 (2009), Justice Scalia rejected circuit-court precedents that required a more substantial explanation for agency action that *changes* prior policy: "We find no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to more searching review." *Id*. at 1810. An agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates." *Id*. (emphasis in original). And, writing for the majority in *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013), he even gave deference to an agency on questions of its own jurisdiction too under the rubric of *Chevron*. He explained that if the Court adopted a different approach, "[t]he effect would be to transfer any number of interpretive decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from the agencies that administer the statutes to federal courts." *Id*. at 1873. In many ways, the Justice's jurisprudence was extraordinarily deferential to agencies, and favorable to agency action.

Yet, at the same time, the Justice was also quick to reject agency overreach made in the name of deference where he thought the statute was clear, and lamented the expanding role of bureaucrats. As he wrote in dissent in *EPA v. EME Homer City Generation, LP*, 134 S. Ct. 1584 (2014), "[t]oo many important decisions of the Federal Government are made nowadays by unelected agency officials exercising broad lawmaking authority, rather than by the people's representatives in Congress." *Id*. at 1610. He, thus, played a role in fashioning what some administrative law professors have called the "major questions" doctrine, which limits *Chevron*'s applicability when important policies are at issue (though, as I will get to in a moment, I do not believe he would have described it that way). Writing for the majority in *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001), Justice Scalia explained that the "[t]he text of [Clean Air Act (CAA)] §109(b), interpreted in its statutory and historical context, and with appreciation for its importance to the CAA as a whole" controlled the outcome, not agency discretion. As he famously put it, "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Id*. at 468 (citing *FDA v. Brown & Williamson*).

At first blush, these could appear to be inconsistent impulses. So what's going on here?

One narrative is that this seeming inconsistency is a product of his approach to textual interpretation. He was less willing to find ambiguity where others might, and therefore, while deferential in the face of true ambiguity, was less prone to find it in the first place. And the Justice himself offered that as a partial explanation during a lecture at Duke Law School in 1989, after he had been on the Supreme Court for less three years. *See* A. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L. J. 511. He said: "In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a 'strict constructionist' of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds more often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds less often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt. Contrariwise, one who abhors a 'plain meaning' rule, and is willing to permit the apparent meaning of a statute to be impeached by the legislative history, will more frequently find agency-liberating ambiguity, and will discern a much broader range

of 'reasonable' interpretation that the agency may adopt and to which the courts must pay deference. The frequency with which *Chevron* will require that judge to accept an interpretation he thinks wrong is infinitely greater." *Id.* at 521.

That is certainly part of the story, but I believe there is a more fundamental undercurrent to the Justice's administrative law jurisprudence, that is ultimately a reflection of his broader approach to statutory and constitutional interpretation. That theme is to place responsibility, and with it *accountability*, first and foremost in the hands of democratically-elected officials and their duly-appointed agents. To be clear, Justice Scalia did not defer to agencies because they were ostensibly filled with "*experts*," but because they were more *democratic* than courts (except when they were thwarting the even more democratic will of the legislature). Thus, I submit, the Justice's decisions reflect his efforts to fashion the best way for the democratic process and democratic ideals to be implemented in the administrative state.

In other words, as between unelected judges and an agency attempting to implement the agenda of the President, Justice Scalia thought that the executive branch should make the call where Congress had left it open to interpretation. Viewed in that light, *FCC v. Fox Television* is a particularly powerful and democratizing precedent—because it means that one Administration can depart from an earlier's policies, without having to justify to a court (perhaps made up of appointees from the prior Administration) that its policies are better than the old policies. In other words, elections have consequences, and those consequences are not diminished by ossification. The dead hand of past administrations should not limit the will of the people as expressed by their current Chief Executive and his (or her) appointees.

At the same time, Congress had the tools to constrain agency action, or not: "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 133 S. Ct. at 1868. Against that backdrop, when agencies adopt unreasonable interpretations, they thwart the democratic process. Thus, his dissent in *EME Homer* challenged what he called an "undemocratic revision of the Clean Air Act" by the agency, that "sacrifices democratically adopted text to bureaucratically favored policy." 134 S. Ct. at 1610-11 (Scalia, J., dissenting). Thus, it all comes back to his reasons for applying textualism, and even originalism, in the first place. As he explained in rejecting the argument that *Chevron* deference should not apply to so-called "jurisdictional" interpretations of agencies because that left the fox guarding the henhouse: "The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decisionmaking that is accorded no deference, *but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it; and where Congress has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow.*" *City of Arlington*, 133 S. Ct. at 1874. That is the boundary that courts are to enforce. Teaching how to police that boundary is part of the tremendous jurisprudential legacy Justice Scalia leaves behind.

In closing, I offer the following resolution on behalf of the Section:

> WHEREAS, our friend and former colleague Justice Antonin Scalia, who passed away on February 13, 2016, served as chair of this Section from 1981–1982;
>
> WHEREAS, Justice Scalia left an indelible mark on administrative law through his jurisprudence, as well as his legal scholarship and service in the Executive Branch;
>
> WHEREAS, Justice Scalia will be missed by his friends and former colleagues in the Section, and by our country;
>
> NOW BE IT RESOLVED that the Section expresses our deep sadness at Justice Scalia's passing and our condolences to his wife, Maureen, their nine children and entire family; and honors his memory for his countless contributions and service to this Section, the legal profession, and the United States of America.

Offered March 12, 2016, in Washington D.C.

ABA House of Delegates Adopts Section Resolution to Modernize APA Rulemaking

Editor's Note: At the ABA's Mid-Year Meeting on February 8, 2016, the ABA House of Delegates approved a list of recommended changes to improve the Administrative Procedure Act (APA) that had been submitted by the Section of Administrative Law and Regulatory Practice.

The ABA Rresolution urges Congress to modernize the rulemaking provisions of the Administrative Procedure Act. The APA has grown outdated or insufficient in a number of respects as agency practice, technology, and judicial doctrine have evolved. The Resolution proposed reforms to modernize the Act that are widely supported within (and outside of) the Section of Administrative Law and Regulatory Practice. These consensus-oriented reforms, while not exhaustive or exclusive, are intended to help enhance public participation in the rulemaking process and to provide clearer direction to agencies. Some codify case law or executive orders and many of them build on prior recommendations of the ABA or the Administrative Conference of the United States.

The ABA and the Section have had a long history of supporting improvements to the administrative process, including to the APA itself. E.g., "ABA Proposals For Amendments to the Administrative Procedure Act," 24 Admin. L. Rev. 371 (Fall 1972); Robert M. Benjamin, "A Lawyer's View of Administrative Procedure. The American Bar Association Program," 26 *Law and Contemporary Problems* 203 (Spring 1961). These latest recommendations should prove helpful as Congress deliberates over various regulatory reform proposals. The full text of the new ABA policy Resolution is reprinted below.

Resolution 106B

RESOLVED, That the American Bar Association urges Congress to amend the rulemaking provisions of the APA. Specifically, Congress should:

1. Codify the requirement that an agency fully disclose data, studies, and other information upon which it proposes to rely in connection with a rulemaking, including factual material that is critical to the rule that becomes available to the agency after the comment period has closed and on which the agency proposes to rely;

2. Provide for the systematic development by the agency in each rulemaking of a rulemaking record as a basis for agency factual determinations and a record for judicial review. The record should include any material that the agency considered during the rulemaking, in addition to materials required by law to be included in the record, as well as all comments and materials submitted to the agency during the comment period. The record should be accessible to the public via an online docket, with limited exceptions allowed, such as for privileged, copyrighted, or sensitive material;

3. Establish a minimum comment period of 60 days for "major" rules as defined by the Congressional Review Act, subject to an exemption for good cause;

4. Clarify the definition of "rule" by deleting the phrases "or particular" and "and future effect"; update the term "interpretative rules" to "interpretive rules"; and substitute "rulemaking" for "rule making" throughout the Act;

5. Authorize a new presidential administration to (i) delay the effective date of rules finalized but not yet effective at the end of the prior administration while the new administration examines the merits of those rules, and (ii) allow the public to be given the opportunity to comment on whether such rules should be amended, rescinded or further delayed;

6. Promote retrospective review by requiring agencies:

   a. When promulgating a major rule, to publish a plan (which would not be subject to judicial review) for assessing experience under the rule that describes (i) information the agency believes will enable it to assess the effectiveness of the rule in accomplishing its objectives, potentially in conjunction with other rules or other program activities, and (ii) how the agency intends to compile such information over time;

   b. On a continuing basis, to invite interested persons to submit, by electronic means, suggestions for rules that warrant review and possible modification or repeal;

7. Add provisions related to the Unified Regulatory Agenda that would require each participating agency to (i) maintain a website that contains its regulatory agenda, (ii) update its agenda in real time to reflect concrete actions taken with respect to rules (such as initiation, issuance or withdrawal of a rule or change of contact person), (iii) explain how all rules were resolved rather than removing rules without explanation, (iv) list all active rulemakings, and (v) make reasonable efforts to accurately classify

all agenda items. All agencies with rulemaking plans for a given year should also participate in the annual Regulatory Plan published in the spring Unified Agenda. These provisions should not be subject to judicial review;

8. Repeal the exemptions from the notice-and-comment process for "public … loans, grants [and] benefits" and narrow the exemptions for "public property [and] contracts" and for "military or foreign affairs functions"; and

9. Require that when an agency promulgates a final rule without notice–and-comment procedure on the basis that such procedure is impracticable or contrary to the public interest, it (i) invite the public to submit post-promulgation comments and (ii) set a target date by which it expects to adopt a successor rule after consideration of the comments received; provided that:

   a. If the agency fails to replace the interim final rule with a successor rule by the target date, it should explain its failure to do so and set a new target date;

   b. The adequacy of the agency's compliance with the foregoing obligation would not be subject to judicial review, but existing judicial remedies for undue delay in rulemaking would be unaffected; and

   c. The preamble and rulemaking record accompanying the successor rule should support the lawfulness of the rule as a whole, rather than only the differences between the interim final rule and the successor rule.

FURTHER RESOLVED, That the American Bar Association recommends that federal agencies experiment with reply comment processes in rulemaking, such as by (a) providing in advance for a specific period for reply comments; (b) re-opening the comment period for the purpose of soliciting reply comments; or (c) permitting a reply only from a commenter who demonstrates a particular justification for that opportunity, such as a specific interest in responding to specified comments that were filed at or near the end of the regular comment period.

Congratulations, Chief Judge Merrick Garland!

Editor's Note: The Section congratulates its former judicial branch liaison Chief Judge Merrick B. Garland, whom President Obama nominated to be an Associate Justice on the Supreme Court of the United States. Chief Judge Garland was appointed to the U.S. Court of Appeals for the D.C. Circuit in 1997 and became Chief Judge on February 12, 2013. He graduated summa cum laude from Harvard College in 1974 and magna cum laude from Harvard Law School in 1977. Following graduation, he served as law clerk to Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and to Justice William J. Brennan, Jr., of the Supreme Court. From 1979 to 1981, he was Special Assistant to the Attorney General of the United States. He then joined the law firm of Arnold & Porter, where he was a partner from 1985 to 1989 and from 1992 to 1993. He served as an Assistant U.S. Attorney for the District of Columbia from 1989 to 1992, and as Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice from 1993 to 1994. From 1994 until his appointment as U.S. Circuit Judge, he served as Principal Associate Deputy Attorney General, where his responsibilities included supervising the Oklahoma City bombing and UNABOM prosecutions. For the past 18 years, he has been a volunteer tutor for elementary school students, and he encourages his law clerks to volunteer as tutors as well.

In 2008, then-Judge Merrick Garland (L) welcomed his colleague Judge A. Raymond Randolph as a Section Fellow. While serving on the D.C. Circuit, both judges also served as the Section's liaison to the judiciary branch – which the Section deeply appreciates. The Section is honored to have Judge Randolph serving in this capacity again this year.

Congress and the New Department of Labor Fiduciary Rule

Lynn White★

The Section's recent Administrative Law Institute (Institute) included panels on congressional interest in regulatory reform and oversight of the rulemaking process. This was a timely discussion as there have been several recent examples of congressional involvement in agency rulemakings. Some Obama Administration officials have been called to appear before Congress to defend their rulemaking activities. *See, e.g.,* U.S.Gov't Accounting Office, Environmental Protection Agency—Application of Publicity and Propaganda and Anti-Lobbying Provisions (2015) (concluding that the Environmental Protection Agency violated federal law "through its use of social media in association with its rulemaking efforts to define 'Waters of the United States' under the Clean Water Act…").

One Department of Labor rule in particular—the so-called "fiduciary" rule—received more attention from Congress than most other rules. The final rule revises how "fiduciary" is defined under the Employee Retirement Income Security Act of 1974 (ERISA), and for purposes of individual retirement accounts (IRAs) under the Internal Revenue Code of 1986 (Code). *See* Definition of the Term "Fiduciary"; Conflict of Interest Rule-Retirement Investment Advice, 81 Fed. Reg. 2945 (Apr. 8, 2016). More specifically, the rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships than previously existed. *Id.* The rule is likely to be challenged in court; but this is a story about how the proposed rule was first contested in Congress.

★Vice Chair, Section's Labor & Employment Committee.

Defining the Term "Fiduciary"

The fiduciary rule was several years in the making. DOL first issued a proposal in 2010. *See* Definition of the Term Fiduciary, 75 Fed. Reg. 65,263 (Oct. 22, 2010). On April 20, 2015, DOL issued a replacement proposal defining the term "fiduciary." 80 Fed. Reg. 21,928. Like many of its recent rulemakings,

> *"DOL contended that these revisions were necessary because current regulatory schemes did not reflect how the retirement investment industry operates."*

DOL contended that the revisions were necessary because existing regulatory schemes do not reflect how the modern retirement investment industry operates.

Specifically, DOL stated that the existing legal standard for fiduciaries, established in 1975, was created before "the existence of participant-directed 401(k) plans, widespread investments in IRAs, and now the commonplace rollover of plan assets from fiduciary-protected plan IRAs." *Id.* As a result, "many investment professionals, consultants and advisors have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments." *Id.* According to DOL, "[n]on-fiduciaries may give imprudent and disloyal advice..." *Id.* This would purportedly leave consumers vulnerable and jeopardize their retirement savings.

In order to address this concern, the regulation proposed a definition whereby "a person renders investment advice by (1) providing investment or investment management recommendations or appraisals to an employee benefit plan, a plan fiduciary, participant or beneficiary, or an IRA owner or fiduciary, and (2) either (a) acknowledging the fiduciary nature of the advice or (b) acting pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets." *Id.* at 21,929. If a fee or other compensation (direct or indirect) is provided, then "the person giving the advice is a fiduciary." *Id.*

DOL acknowledged that this definition is overbroad. The proposed rule stated that "standing alone [the definition] could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships." *Id.* Thus, the proposal created a number of "carve outs" to try to address this issue, including drawing distinctions between fiduciary investment advice and non-fiduciary investment advice or education, excluding recommendations made to a plan in an "arm's length transaction where there is generally no expectation of fiduciary investment advice" and "carve-outs for advice rendered by employees of the plan sponsor, platform providers, and persons who offer or enter into

swaps or security based swaps with plans." *Id.* Certain conditions must be met for the "carve-outs" to apply.

Congressional Opposition

Members of Congress made their opposition to DOL's proposed rule known before the second notice of proposed rulemaking was even published. On February 25, 2015, Representative Ann Wagner (R-Mo.) introduced House Bill 1090, the Retail Investor Protection Act, which would have prohibited DOL from issuing the final fiduciary rule. H.R. 1090, 114th Cong. (2015). Rep. Wagner filed a similar bill in the 113th Congress that passed the house on October 29, 2013. H.R. 2374, 113th Cong. (2013). The bill died in the Senate, which was controlled by Democrats at the time. On October 27, 2015, House Bill 1090 also passed the House with a 245-186 vote. Three Democrats voted for the bill.

Multiple bills were filed in the Senate to stop the fiduciary rule. On February 2, 2016, Senator Johnny Isakson (R-Ga.) filed Senate Bill 2502, the Affordable Retirement Advice Protection Act. S. 2052, 114th Cong. (2016). Senate Bill 2502 would prohibit DOL from amending the fiduciary rule without congressional approval. S. 2502(b). Shortly after, Senator Roy Blunt (R-Mo.) introduced Senate Bill 2497, the Retail Investor Protection Act of 2016. S. 2497, 114th Cong. (2016). Senator Blunt's bill is similar to House Bill 1090.

Democrats were also vocal about their opposition to the rule. Senators Joe Manchin (D-W.Va.) and Ben Cardin (D-Md.) have publicly questioned the rule. Kevin Cirilli, *Dem Senators Raise Concerns Over Financial Adviser Rules*, The Hill, Apr. 28, 2015, http://thehill.com/policy/finance/240373-dem-senators-raise-concerns-over-financial-adviser-rules. Senator Cardin specifically raised questions about how DOL would harmonize its bill with the Securities and Exchange Commission's efforts to study how or whether fiduciary standards would help consumers pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act. *Id.* On September 24, 2015, 96 Democrats signed on to a letter circulated by Rep. Gwen Moore (D-Wi.) noting that stakeholders have concerns about specific provisions in the proposal. Letter from Rep. Gwen Moore, Et al., to U.S. Sec'y of Labor, Thomas Perez (Sept. 24, 2015). The letter also requested that DOL convene a working group of "industry professionals and consumer advocates" to help finalize the rule. *Id.*

"The fiduciary rulemaking provides an interesting study in checks and balances between the Executive and Legislative Branches of government."

Despite the backlash and congressional opposition, DOL remained undeterred. As noted earlier, the final rule was published on April 8, 2016. Although there is considerable public support for the rule, deep criticism also remains. As one publication noted, "a defiant Labor Secretary Thomas Perez brushed aside criticism [of the proposed rule]..." Jonathan Hilton, *DOL's Perez Defends Fiduciary Rule, Setting Up Legislative Challenge*, InsuranceNewsNet, Aug. 12, 2015, https://insurancenewsnet.com/innarticle/dols-perez-defends-fiduciary-rule-setting-up-legislative-challenge.

The fiduciary rulemaking, like many rules promulgated during the Obama Administration, provides an interesting study in checks and balances between the Executive and Legislative Branches of government. The Section should continue to provide opportunities for dialogue between key stakeholders on the role of Congress in agency rulemakings and the limits of congressional intervention in the rulemaking process when facing a determined Executive Branch.

Regulation of the Sharing Economy: Uber and Beyond

Jack M. Beermann★

On January 8, 2016, the Section held a program entitled "Regulation of the Sharing Economy: Uber and Beyond." I served as moderator of the program, which included four excellent speakers, Nicole Benincasa, Attorney for Uber Technologies, Inc., Bernard N. Block, Managing Principal, Alvin W. Block & Associates, Chicago, Illinois, Randy May, Founder and President, Free State Foundation (and long-time active member of the Section) and Peter Mazer, General Counsel to the Metropolitan Taxicab Board of Trade and former General Counsel to the New York City Taxicab Licensing Commission.

The program began by asking general questions about regulatory issues concerning the new "sharing economy" including vacation rental operations like Airbnb and ride-sharing companies like Uber and Lyft. It then focused on the regulatory environment surrounding ride-sharing and the economic and social effects that the development of ride-sharing companies like Uber have had. The panel and the audience engaged in a wide-ranging discussion of the regulatory challenges facing industry and government in the face of evolving technology and consumer behavior.

Randy May, of the Free State Foundation, set the stage for the discussion by presenting his perspective on the appropriate conditions for government regulation of businesses like Uber. Drawing from his experience in the communications field, he observed that a great deal of regulation is used by existing regulated parties to try to prevent competition, which in his view is similar to the way that taxicab interests are trying to use regulation to keep new entrants like Uber out of the market. He presented regulation as taking two forms—precautionary regulation to prevent harms and permissionalist regulation to enable innovation and economic expansion. Unless there are documented harms that need to be addressed, he observed that given the pace of innovation today, permissionalist regulation is preferable to precautionary regulation. In his view, too much regulation today is contrary to economic development and freedom.

"The panel and the audience engaged in a wide-ranging discussion of the regulatory challenges facing industry and government in the face of evolving technology and consumer behavior."

Nicole Benincasa, of Uber, began by defining the sharing economy and presenting Uber in an historical perspective. She noted that Uber provides transportation in areas that have been traditionally underserved by public transportation and taxis. Drivers like Uber because they can work around their other commitments, such as family responsibilities and other employment. Uber is now available in 361 cities across the world. She recounted how at the beginning of the twentieth century, jitneys were a common form of transportation with an historical perspective. Streetcars were the predominant form of transportation. They had no competition and lacked incentives to provide better service, so people started providing cheap rides in their own car. This was known as the jitney nickel.

The effects of the advent of jitney were immediate and striking. Within a year, for example, there were over 500 jitneys in Seattle, accident rates soared and insurance was generally lacking. The railroads started losing money and they put political pressure on municipalities to regulate jitneys, which they did, and those regulations limited the ability of jitneys to compete. Among other regulatory burdens, jitneys were required to pay for expensive licenses and insurance policies, and this doomed the jitneys. They went from 62,000 nationwide to virtually none by 1919.

Ms. Benincasa also provided details on how Uber works with regulators to enable the development of the sharing economy. Ride-sharing is forbidden in New York City, so Uber drivers get licenses from the taxicab commission. The model doesn't allow for part-time and more casual drivers as in other places, and she called the New York rules "a broken system." Uber is seeking regulation across the country to legitimate their business. At this time, 70 municipalities in the U.S. have regulations for Uber. She is worried about unnecessary protectionist regulation, which could destroy Uber the way regulation in the early twentieth century destroyed the jitney business. She agrees that safety and consumer protection rules

★ Professor of Law, Boston University School of Law.

are necessary, but also believes that people should be free to use their cars to offer rides using the Uber system.

Peter Mazer of the New York Taxicab Board based his presentation on his 15 years of experience as a taxicab regulator, writing and enforcing regulations, and 15 years as an attorney representing taxicab industry interests, where he realized that the regulators did not have all the answers. His view is that we don't need excessive regulation, we need sensible regulation. He noted that taxicab regulation is historically local and that there are two main reasons for this local regulation—promoting public safety and promoting equity and fairness across the industry.

With regard to safety, Mr. Mazer said that regardless of how a driver summons a ride, the driver is transporting people for hire and should be subject to safety regulation. The passenger client has a right to know that the driver has been properly vetted for safety and carries adequate insurance. New York has set the standard for this. Fingerprinting and background checks are mandatory for all drivers in transportation for hire and this, along with continued monitoring, ensures the safety of passengers. He agrees that industry should not be trusted to self-regulate. Insurance requirements are also very important, and regulations in the last few decades have prevented taxicab companies from under-insuring, which provides compensation for injured customers.

Mr. Mazer expressed disagreement with the prior speakers on the need for economic regulation. One important aspect of regulation is to ensure adequate service and not allow the market to be saturated with so many taxis and other cars that drivers cannot make a living. In his view, the lack of regulation would ultimately drive down the level of service. There has to be a balance between providing adequate service and adequate economic incentives to provide that service. If income decreases too much, service will suffer. He also disputed the notion that it's difficult to get a taxicab license in New York City—there are 94,000 people with such licenses including many people from immigrant communities. For safety and ensuring that drivers can make a living, while the regulations are not perfect, they work pretty well and all drivers for hire should be subject to the same rules.

Bernard Block spoke from the perspective of a lawyer who works extensively in the field of secured financing of the taxicab industry. The original sharing economy was like "carpooling on steroids" but now ride-sharing cars are often former taxicabs and other cars that are leased by the week for use in the ride-sharing industry. The internet has allowed developments to outpace the structure of regulation, and regulation is needed to deal with developments that could not have been anticipated before these developments.

Mr. Block provided a very clear explanation of how selective non-enforcement of regulations has allowed ride-sharing to flourish at the expense of the taxicab industry. Almost all decent sized municipalities have licensing and other regulatory requirements for transportation for hire, and ride-sharing companies claim that these rules do not apply to them. He said that some cab companies have used apps to summon rides within the regulatory scheme, but they could not lower their fares (or increase them in times of high demand to attract more drivers) without violating local rules. Uber and other ridesharing companies could compete by not following these rules, which was unfair to taxicab companies that were obeying the rules.

Mr. Block also discussed how taxicab businesses, including many relatively small family-owned businesses are suffering because they have to pay for licenses, medallions and commercial insurance while ridesharing enterprises do not. The taxicab industry depends on extensive lending of capital, but the business model has now been decimated and many loans are in default. In his view, evenhanded regulation is the key to the continuing viability of the taxicab industry and non-enforcement is unfair to those against whom all the rules are enforced.

The presentations were followed by a lively discussion among the panelists and audience members. One thing is certain—given all of the controversy over the sharing economy, this panel is not the last word on these matters, but it provided an excellent introduction to the regulatory issues surrounding the development of the sharing economy, mainly in the ride-sharing area.

MAKE YOUR OPINION COUNT

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.

Supreme Court News

By Lincoln L. Davies and F. Andrew Hessick***

In the second quarter of the 2015 October Term, the Supreme Court has issued six decisions of significance to administrative law. The first four cases involve questions of statutory interpretation regarding the scope of the Federal Energy Regulatory Commission's power under the Federal Power Act, the availability of immunity under the Foreign Sovereign Immunities Act, the Federal Arbitration Act's preemption provision, and the assignment of redistricting cases to three-judge district courts. The other two cases address the limits of equitable tolling, and mootness created by settlement offers.

The Court has also granted review in several cases presenting a variety of important issues of administrative law. These cases include challenges raising the reviewability of administrative action; mootness; patent procedures; entitlement to overtime pay; and most significantly, the Department of Homeland Security's deferred-action program for millions of undocumented immigrants.

Federal Power Act

One of the Court's most important administrative law cases so far this term is *FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016), which clarified the scope of the Federal Energy Regulatory Commission's authority under the Federal Power Act (FPA). That statute gives FERC exclusive authority over "the sale of electric energy at wholesale in interstate commerce," including not just the rates of such sales but also any rule or practice "affecting" those rates. 16 U.S.C. §§ 824(b), 824e(a). At the same time, the Act reserves to the states authority over "any other sale" of electricity, including, specifically, retail electricity sales. *Id.* § 824(b).

At issue in *Electric Power Supply Ass'n* was a FERC rule, Order No. 745, that regulates regional electricity system operators, which manage wholesale electrical markets by matching electricity-supply bids from generators with purchase bids from electricity buyers. The rule requires operators to pay the same amount to large consumers and others that *reduce* their electricity consumption as those operators pay to electricity generators that *produce* power. The D.C. Circuit vacated the rule.

In a 6-2 decision (Justice Alito did not participate), the Supreme Court reversed. The Court, in an opinion by Justice Kagan, first held that FERC's rule was jurisdictionally proper under the FPA. The Court began by acknowledging that FERC's authority to regulate practices "affecting" interstate wholesale power sales must receive "a non-hyperliteral reading … to prevent the statute from assuming near-infinite breadth." 136 S. Ct. at 774. To do so, the Court adopted "a common-sense construction of the FPA's language," one that limits "FERC's 'affecting' jurisdiction to rules or practices that 'directly affect the [wholesale] rate.'" *Id.* That test, however, the Court said, was easily met. Order No. 745 requires *wholesale* operators to accept *wholesale* bids to reduce power in the *wholesale* market, in an effort to make that market function more efficiently. That places Order No. 745 squarely within FERC's jurisdiction.

Nor, the Court held, did Order No. 745 run afoul of the FPA by regulating a retail sale of electricity. While acknowledging that "wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other," the Court ruled that a wholesale market rule's influence on the retail market does not render the rule a regulation of the retail market. "[A] FERC regulation does not run afoul of § 824(b)'s proscription just because it affects—even substantially—the quantity or terms of retail sales." *Id.* at 776. Thus, because Order No. 745 does not regulate retail sales at all, the Court deemed it permissible under the FPA.

Finally, the Court rejected challenges asserting that Order No. 745 is arbitrary and capricious. The Court stated that, while a pricing methodology different from the one ultimately adopted by FERC was offered and considered in the rulemaking process, FERC had good logical and pragmatic reasons for choosing the method it did, backed up by expert economic analysis. Given that, and its obligation to defer to FERC in its area of expertise, the Court found the rule lawful.

Justice Scalia, joined by Justice Thomas, dissented on the ground that reductions in electricity consumption are not actual "energy sales" under the statute, and thus are outside FERC's regulatory authority.

Foreign Sovereign Immunity

At issue in *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390 (2015), was the scope of the commercial activity exception to foreign sovereign immunity. Under the Foreign Sovereign Immunities Act, foreign states and their agencies are immune from suit in United States courts unless the suit falls within one of the Act's exceptions. One of those exceptions is the commercial activity exception, which withdraws sovereign immunity in any case "in which the action is based upon a commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2).

Carol Sachs purchased in the United States a Eurail pass to travel in Europe. While on her trip, she fell onto the tracks at a train station in Austria as she was attempting

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to board a train operated by the Austrian state-owned railway. She sued the railway for personal injuries in federal district court, arguing that sovereign immunity did not bar her suit because it was "based upon" the railway's sale of the pass to her in the United States.

In a unanimous decision written by Chief Justice Roberts, the Supreme Court disagreed. The Court concluded that Sachs's suit for personal injuries was not "based upon" the sale of the Eurail pass. It reasoned that the commercial exception applies only when the commercial activity itself forms the basis for the plaintiff's action. Thus, for instance, a claim alleging misconduct in the sale of the Eurail pass itself in the United States might fall within the exception. But Sachs's personal injury claim did not fall within the exception, because the events giving rise to her suit—the conduct of the railroad in Austria—occurred outside the United States. Accordingly, the Court held that sovereign immunity barred the claim. *Id.* at 396.

Preemption

In *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, (2015), the Court once again addressed the scope of preemption under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*

DIRECTV's service contract provides that all customer claims against DIRECTV must go to arbitration. The contract also prohibits class arbitration, but it provides that, if the "law of your state" makes the waiver of class arbitration unenforceable, then the entire arbitration provision "is unenforceable."

In 2008, Amy Imburgia and Kathy Greiner sued DIRECTV in California state court, seeking damages for early termination fees that allegedly violated California law. DIRECTV moved to send the matter to arbitration. The trial court denied the motion.

The California Court of Appeal affirmed. The court explained that the California Supreme Court had held in 2005 that class arbitration provisions of the sort found in DIRECTV's contract are unconscionable and therefore unenforceable. Although the Supreme Court had held in *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333 (2011), that the FAA preempted that California rule, the California Court of Appeal reasoned that under *California's* law the arbitration waiver was still unenforceable.

By a 6-3 decision, the Supreme Court reversed. In an opinion by Justice Breyer, the Court explained that the FAA preempts a state rule forbidding the enforcement of an arbitration provision unless that rule applies equally to non-arbitration provisions. Applying that test, the Court concluded that the California rule was inconsistent with the FAA because it would not be applied to non-arbitration provisions.

As the Court noted, in enforcing the arbitration prohibition provision, the lower court interpreted the phrase "law of your state" to include invalid California law. Although accepting that interpretation, the Supreme Court reasoned that a similar interpretation would not be applied to other, non-arbitration contracts containing a similar provision. The Court explained that the ordinary meaning of "law of your state" encompasses only valid state law. Accordingly, in other, non-arbitration contexts, similar language would likely be interpreted to refer only to valid state law. *DIRECTV*, 136 S. Ct. at 468-70.

Justice Thomas dissented, reiterating his view that the FAA does not apply to proceedings in state courts. *Id.* at 471.

Justice Ginsburg also dissented, joined by Justice Sotomayor. She argued that the contract should be read against DIRECTV because it drafted the contract. *Id.*

Redistricting

In *Shapiro v. McManus*, 136 S. Ct. 450 (2015), the Court clarified when a court must assign a redistricting challenge to a three-judge district court. A group of citizens filed suit in federal district court, challenging Maryland's 2011 redistricting. Under 28 U.S.C. § 2284(a), a "district court of three judges shall be convened when … an action is filed challenging the constitutionality of" state districting. Section 2284(b)(1) implements this requirement by providing that, if a party in a redistricting challenge requests three judges, "the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges."

Invoking § 2284(b)(1), the plaintiffs in *Shapiro* requested that the case be assigned to a three-judge district court. The district court, however, did not rule on the request. Instead, it concluded that the plaintiffs had failed to state a claim for which relief could be granted, and it therefore dismissed the claim without referring the matter to the chief judge.

The Supreme Court unanimously reversed. In an opinion by Justice Scalia, the Court declared that § 2284(a) "could not be clearer: A district court of three judges *shall be convened* … when an action is filed challenging the constitutionality of the apportionment of congressional districts." Accordingly, because the suit was an action challenging Maryland's apportionment, "the district judge was *required* to refer the case to a three-judge court." *Shapiro*, 136 S. Ct. at 454.

The Court rejected the argument that the subsequent provision in § 2284(b)(1)—that the district judge shall commence the process for appointment of a three-judge panel "unless he determines that three judges are not required"—conferred discretion on the district judge not to refer apportionment challenges. It explained that

the purpose of that provision was simply to clarify that a district judge need not refer a matter that does not involve an apportionment challenge. Thus, "all the district judge must 'determin[e]' is whether the 'request for three judges' is made in a case covered by § 2284(a)." *Id.* at 454-55.

Equitable Tolling

In *Menominee Tribe of Wis. v. United States*, 136 S. Ct. 750 (2016), the Court addressed whether the statute of limitations under the Contract Disputes Act of 1978, 41 U.S.C. § 7101 *et seq.*, for a claim against the Indian Health Service was equitably tolled. Under the Indian Self–Determination and Education Assistance Act (ISDA), 25 U.S.C. § 450 *et seq.*, a tribe may enter into a contract with the federal government to administer federally funded programs. The tribe receives money that the government would have spent on the program if it had administered the program itself, as well as reimbursement for the costs of carrying out the program. Under the Contract Dispute Act, a tribe that disputes the amount of reimbursement from the government may present a claim to a contracting officer. Those claims must be brought within six years.

Pursuant to the ISDA, the Menominee Indian Tribe of Wisconsin contracted with the Indian Health Service (IHS) to operate federal programs. In 2005, the Tribe presented claims to a contracting officer, asserting that IHS had failed to reimburse the Tribe adequately for administering those programs from 1996 through 1998. Although those claims fell outside the six-year statute of limitations, the Tribe argued that the limitations period was tolled during the pendency of a putative class action filed by other tribes raising similar claims. According to the Tribe, because it would have been a member of the class if it were certified, the limitations period for its claim should be tolled. The contracts officer rejected the argument. The district court reached the same conclusion, and the D.C. Circuit affirmed.

The Supreme Court unanimously affirmed. In an opinion by Justice Alito, the Court began by reaffirming that a litigant is entitled to equitable tolling only if it establishes "(1) that [it] has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in [its] way and prevented timely filing." It then clarified that the "extraordinary-circumstances prong" of that test covers only "matters outside its control." *Menominee Indian Tribe*, 136 S. Ct. at 756.

Applying that test, the Court concluded that the limitations period had not been tolled during the pendency of the putative class action. It noted that the Tribe had conceded that it could not have been a member of the putative class action "because it did not present its claims to an IHS contracting officer before class certification was denied." Thus, because nothing "outside its control" had prevented

Cases Potentially Impacted by Supreme Court Vacancy

The unexpected death of Justice Scalia on February 13 leaves the Supreme Court with only 8 members to decide the 24 cases still pending before the Court this Term. Justice Scalia's vote in those pending cases will not be counted. Although the justices vote on cases in private conferences after oral argument, those votes are only tentative. The final vote is considered cast only when the decision is handed down.

As in other areas of the law, administrative law cases where Justice Scalia's death may most critically influence the outcome at the Supreme Court are those where the Court is most closely divided. Several pending cases present issues on which the justices are likely sharply divided, meaning that the Court may now evenly divide 4-4. The consequence, of course, of an evenly divided decision is that the decision of the lower court is affirmed (without opinion and with no indication as to how each Justice voted).

One case in which this possibility came to pass is *Friedrichs v. California Teachers Assoc.*, No. 14-915 (Mar. 29, 2016), which considered whether public sector unions may charge non-members union fees, if those fees are used only to cover benefits that the union secures for non-members. The lower court held, consistent with earlier Supreme Court decisions, that unions could charge those fees. Justice Scalia had indicated that he would reverse the lower court, but on March 29, the Court affirmed by an evenly divided vote.

Another case that presents the possibility of an evenly divided Court following Justice Scalia's death is *Evenwel v. Abbott*, No. 14-940 (arg. Dec. 8, 2015), which presents the question whether, under the "one-person, one-vote" principle of the Equal Protection Clause, states may draw district lines based on the total population or only on the voting population. The lower three-judge district court held that the states may use total population.

continued on page 23

the Tribe from presenting its claim before the denial of class certification, the Tribe had failed to establish extraordinary circumstances tolling the limitations period. *Id.* at 756-57.

Mootness

In *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016), the Court determined that a case does not become moot if a plaintiff rejects a settlement offer that would have provided the plaintiff with complete relief for his claim. The United States Navy contracted with Campbell to help the Navy with recruiting. Campbell proposed sending text messages to young adults. The Navy approved the proposal, but directed that the messages be sent only to individuals who had "opted in" to receiving those kinds of messages.

Jose Gomez received one of these texts even though he had not consented to receiving them. He accordingly brought a putative class action against Campbell, alleging that it violated the Telephone Consumer Protection Act (TCPA), which prohibits using an automatic dialing system to send texts to a cellphone without the express consent of the text recipient. 47 U.S.C. § 227(b)(1)(A)(iii).

Before the class had been certified, Campbell offered to settle Gomez's individual claim for the full amount of damages he sought and filed an offer of judgment under Federal Rule of Civil Procedure 68. Gomez rejected the offer, but Campbell moved to dismiss the case as moot because it had offered Gomez complete relief.

The district court denied the motion to dismiss. But it subsequently dismissed the case on the ground that Campbell was entitled to sovereign immunity as a government contractor. The Ninth Circuit affirmed the determination that the case was not moot, but reversed the determination that Campbell was entitled to sovereign immunity.

The Supreme Court affirmed. In an opinion by Justice Ginsburg, the Court began by explaining that Campbell's offer had not rendered the case moot. It stated that a case becomes moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party," and that the court could still provide relief because Gomez had refused Campbell's offer. As the Court put it, "[w]hen a plaintiff rejects … an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect." *Campbell-Ewald*, 136 S. Ct. at 670. In so ruling, the Court expressly reserved the question whether "the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."

The Court also concluded that Campbell was not entitled to sovereign immunity. It explained that government contractors have some degree of "immunity in connection with work which they do pursuant to their contractual undertakings with the United States." But, the Court said, "that immunity, … unlike the sovereign's, is not absolute." In particular, that immunity does not extend to a contractor who violates "both federal law and the Government's explicit instructions, as here alleged." *Id.* at 672.

Justice Thomas concurred in the judgment. He agreed with the majority that Campbell's offer did not render the case moot. But he based that conclusion on the ground that at the time of the framing, a mere offer of relief was insufficient to deprive a court of jurisdiction. *Id.* at 674.

Chief Justice Roberts dissented, joined by Justices Scalia and Alito. In his view, the case was moot because Campbell's offer of complete relief made litigation unnecessary to remedy Gomez's injury. *Id.* at 677.

Justice Alito filed a separate dissent.

Certiorari Grants

Immigration

One of the most significant administrative law cases on the upcoming docket is *United States v. Texas*, No. 15-674. In November 2014, President Obama announced the Deferred Action for Parental Accountability program (DAPA), which would allow certain undocumented immigrants to apply to stay and work in the country for three years. To qualify for DAPA, an immigrant must have been in the United States since January 2010, have at least one child who is a lawfully permanent resident or U.S. citizen, and meet other requirements. Texas, along with twenty-five other states, challenged DAPA. The district court preliminarily enjoined the program, and the Fifth Circuit affirmed.

Now before the Supreme Court, the case presents several significant issues of administrative law. The first is whether Texas's challenge to DAPA is justiciable under Article III and the Administrative Procedure Act. The second issue is whether DAPA is arbitrary and capricious or otherwise not in accordance with law. A third issue is whether DAPA is invalid because it was not promulgated through the APA's notice-and-comment procedures. And a fourth issue is whether DAPA violates the Take Care Clause in Article II of the Constitution.

Mootness

In *Microsoft Corp. v. Baker*, No. 15-457, the Court will consider an aspect of the class action exception to mootness. In *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), the Court held that a named plaintiff may appeal the denial of class certification even after that plaintiff's claim had become moot. But in that case, the plaintiffs' claim had become moot involuntarily. The question in

Microsoft is whether a named plaintiff may appeal the denial of class certification after he has voluntarily dismissed his claim with prejudice.

Free Exercise Clause

In *Trinity Lutheran Church v. Pauley*, No. 15-577, the Court will address the constitutionality of excluding churches from a secular aid program. Missouri's Scrap Tire Grant Program provides funds to nonprofit organizations for the installation of rubber playground surfaces. Trinity Lutheran Church applied for funds under this program, but Missouri denied the application based on Trinity's status as a church. The question before the Court is whether this denial of funds violates the Free Exercise and Equal Protection Clauses.

Statutory Interpretation

Several grants involve issues of statutory interpretation. In *CRST Van Expedited, Inc. v. EEOC*, 14-1375 (arg. Mar. 28, 2016), the Court will consider the availability of attorney's fees from the EEOC. Under Title VII, a person allegedly aggrieved by an unlawful employment practice may file a charge with the EEOC. The EEOC must undertake an investigation of the alleged misconduct. If it determines that there is reasonable cause to believe the charge is true, the EEOC must seek to address the alleged misconduct through informal conciliation before bringing suit. In *CRST Van*, the district court dismissed an EEOC action against CRST Van on the ground that the EEOC had not satisfied its investigation and conciliation efforts before bringing suit. The question before the Court is whether that dismissal provides a basis for awarding attorney's fees against the EEOC.

In *Army Corps of Engineers v. Hawkes Co., Inc.*, No. 15-290 (arg. Mar. 30, 2016), the Court will consider whether a determination by the United States Army Corps of Engineers that property contains "waters of the United States" protected by the Clean Water Act is subject to judicial review under the Administrative Procedure Act.

At issue in *Encino Motorcars, LLC v. Navarro*, No. 15-415, is the scope of those entitled to overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201–19. Under the Act, an employee is entitled to overtime pay for work exceeding 40 hours per-week. The Act exempts from this requirement an employee who is a "salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." *Id.* § 213(b)(10)(A). The question in *Encino Motorcars* is whether "service advisors" at a car dealership whose primary job responsibilities involve identifying service needs and selling service solutions to the dealership's customers fall within this exemption.

Finally, two matters of statutory interpretation, both relating to inter partes review proceedings, are at issue in *Cuozzo Speed Technologies v. Lee*, No. 15-446. Inter partes review is an administrative proceeding in the United States Patent and Trademark Office (PTO) in which members of the public can challenge the validity of patents and seek to obtain their cancellation. The PTO is charged with prescribing regulations pertaining to inter partes review. 35 U.S.C. § 316(a)(4). Pursuant to this authority, the PTO promulgated a rule providing that patent claims shall be given their "broadest reasonable construction" during inter partes review proceedings. In *Cuozzo*, the Court will consider the validity of that rule. The Court will also consider whether the PTO's decision whether to institute inter partes review is judicially reviewable.

Cases Potentially Impacted by Supreme Court Vacancy

continued from page 21

A third case that has the potential to divide the Court evenly is *Whole Woman's Health v. Hellerstedt*, No. 15-274 (arg. Mar. 2, 2016). That case challenges a Texas law restricting abortion, arguing that the restriction does not actually achieve Texas's stated purpose for the law of promoting health. The Fifth Circuit upheld the law as constitutional.

Another case out of the Fifth Circuit that is likely to divide the Court sharply is *United States v. Texas*, No. 15-674. There, the Fifth Circuit affirmed a preliminary injunction against the Obama Administration's deferred-action program for millions of undocumented immigrants.

It should be noted that, even if the justices are evenly divided in a particular case, they are not compelled to issue a 4-4 decision. Instead, they may schedule the case for reargument after Justice Scalia's successor has been appointed. The justices may also try to find a narrow basis for decision that avoids a 4-4 decision. The Court appears to be trying to follow that course in *Zubik v. Burwell*, No. 14-1414, and companion cases, which considers whether HHS has violated the Religious Freedom Restoration Act by requiring various religious entities that object to providing contraceptive-coverage for their employees to submit a form stating those objections. On March 29, the Court issued an order directing the parties to submit briefs addressing whether contraceptive-coverage could be obtained for employees in a way that does not involve the religious employer.

News from the Circuits

*By Bill Jordan**

D.C. Cir.—Standing for the Justice League, but not for Batman or Wonder Woman?

In her dubitante opinion in *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087 (D.C. Cir. 2015) (*PETA*) (recognizing standing but dismissing for lack of final agency action), Judge Patricia Ann Millett complained that the majority's opinion would have granted standing to the Justice League if it complained of an agency's failure to enforce its statutes or rules even if Batman or Wonder Woman (or any other individual member of the Justice League) would not be granted standing for the same complaint. Severely criticizing a line of D.C. Circuit decisions following *Havens Realty Corp. v. Coleman,* 455 U.S. 363 (1982), but bound by their precedential force, she would have denied standing, rather than dismissing for a lack of final agency action.

The *PETA* decision involved the Animal Welfare Act, which initially was not applied to birds. After congressional action in 2002 indicated that the statute was intended to apply to birds, the Department of Agriculture in 2004 announced that it would apply the Act's protections to our avian neighbors. Believing that its existing general animal welfare regulations were not appropriate for birds because they were developed for mammals, the agency announced that it was taking steps to promulgate appropriate regulations, but it never did so. According to PETA, the agency never did apply the statute to birds and those who would be licensed to handle them. PETA challenged the agency on various grounds, which came down to "a claim that the USDA's alleged policy of not enforcing the general regulations with respect to birds … constitutes agency action 'unlawfully withheld,' in violation of section 706(1) of the APA."

Asserting "organizational standing," PETA had to show that the agency's failure to enforce the statute with respect to birds had caused an injury in fact to its interests as an organization. It would not be enough for PETA to show that it had merely diverted its own resources or engaged in litigation to protect its interests.

PETA based its standing argument on harm to its efforts to educate the public "by providing 'information about the conditions of animals held by particular exhibitors.'" Because the USDA did not apply the general animal welfare standards to birds, PETA was deprived of "the same inspection reports and redress mechanisms for birds that it currently uses for other species." In the absence of the information that PETA said should be provided by the agency, PETA had to redirect its own resources to obtain that information. According to the majority, "if an organization expends resources 'in response to, and to counteract, the effects of the defendants' alleged [unlawful conduct] rather than in anticipation of litigation,'" the organization had suffered an injury sufficient to support standing.

Having found standing, the majority nonetheless dismissed. PETA had relied upon § 706(1) of the Administrative Procedure Act, under which a court may "compel agency action unlawfully withheld." The agency had withheld enforcement of the statute with respect to birds, but this did not constitute the withholding of "agency action." Under Supreme Court precedent, §706(1) authorizes judicial review only where an agency has failed "to take a *discrete* agency action that [the agency] is *required to take*." A failure to act by a given statutory deadline would probably qualify as unlawfully withholding agency action, but the general failure to apply or enforce a statute does not.

Bound by circuit precedent, Judge Millett nonetheless filed a dubitante opinion in which she argued that recognizing standing for PETA on these facts "is in grave tension with Article III precedent and principles." She saw the majority opinion as recognizing standing for an organization in circumstances where standing would not be recognized for individuals. In her view, this dispute involves nothing more than an assertion that PETA was harmed by the agency's failure to enforce the law against others, which is not a "cognizable Article III injury" whether the plaintiff is an individual or an organization.

The majority had recognized standing based upon the fact that the agency's failure to enforce had resulted in a failure to collect and report various types of information, which then had not been available to PETA to use in its public education efforts. Instead, PETA had to expend its resources to gather information and perform its duties in other ways. According to Judge Millett, it was hard to reconcile this ruling "with the general rule that a plaintiff's voluntary expenditure of resources to counteract governmental action that only indirectly affects the plaintiff does not support standing."

She distinguished the Supreme Court's *Havens Realty* decision as having involved a very different kind of interference with information important to an organization's achievement of its purposes. In *Havens Realty*, the Fair Housing Act confered on all "persons" a legal right to truthful information about housing," and the realty company's provision of misinformation had interfered with a fair housing organization's efforts to achieve its purposes. That case involved affirmative interference with information, while *PETA* involved the failure to develop information as a result of the failure to enforce the statute.

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Understood in that way, she argued, the PETA claim provides no basis for standing.

D.C. Cir.—No standing based on increased risk without "something from which the Court can infer that risk," and no organizational standing based upon costs of advocacy

The Poultry Products Inspection Act requires the Secretary of Agriculture to assure that a federal or state inspector examine the carcasses of all poultry processed for human consumption. Prior to the changes at issue in *Food and Water Watch Inc. v. Vilsack*, 808 F.3d 905 (D.C. Cir. 2015), government inspectors sorted and examined all carcasses, with some assistance from industry personnel. Out of concern that "agency resources were not being used in the most effective way to ensure food safety," the Food Safety and Inspection Service (FSIS) promulgated a rule under which the poultry industry would be responsible for sorting and examining carcasses under FSIS supervision. After a pilot program employing this approach was held contrary to the statute, the FSIS modified the program to place a government inspector at the end of each slaughter line to evaluate each carcass after company personnel had sorted and processed the carcasses.

Food and Water Watch challenged the new inspection regime on various grounds and sought a preliminary injunction against its implementation. Imposing a "heightened standard" of "a substantial likelihood of standing," appropriate for consideration of a motion for preliminary injunction, the District Court dismissed the action for lack of standing. Rejecting the District Court's standard as inappropriate for dismissal of the entire case, the D.C. Circuit required only that the plaintiffs state "a plausible claim" to standing. Despite the loosened standard, the court again dismissed for lack of standing.

Food and Water Watch sought associational standing based upon the alleged increase in the risk of foodborne illness for its members. Noting that this sort of standing claim requires "a very strict understanding of what increases in risk and overall risk levels can count as 'substantial,'" the Court asked whether the new inspection system "substantially increases the risk of contracting foodborne illness compared to the existing inspection methods" and whether there was "a substantial probability that the Individual Plaintiffs and FWW members will contract a foodborne illness given that increase of risk."

The plaintiffs claim failed to show the necessary substantial increase in risk. Although the plaintiffs provided a great deal of detail about the changes in the inspection process, they failed to take into account various ways that the new process might enhance outcomes. Ultimately, the allegations "at best, gave rise to the inference that establishment personnel will not be as effective in identifying adulterated poultry," but they did not support an inference that the program as a whole would substantially increase risks.

Noting that it had and continued to "refuse to hold that statistics are required for" increased-risk-of-harm cases, the court nonetheless held that "where a plaintiff's allegations incorporate statistics and the plaintiff contends that the statistics demonstrate a substantial increase in the risk of harm, the plaintiff must allege something from which the Court can infer that risk." In this case, the mere switch of inspection personnel was not enough to support such an inference, particularly when some aspects of the new inspection system arguably increased protection of food safety.

Plaintiffs also claimed injury due to the fact that they had to incur costs to purchase poultry from sources other than those subject to the allegedly flawed inspection system. The majority rejected this claim on the ground that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." Concurring in the result, Judge Henderson would have dismissed on this ground alone, asserting that the plaintiffs' assertions demonstrate that they have alternative sources of what they believe to be healthy poultry, and they have failed to allege that the healthy poultry is not available at a reasonable cost. Thus, any possible harm from the purchase of government-inspected poultry would be self-imposed and cannot support standing.

In addition to relying upon the interests of its members, Food and Water Watch sought organizational standing on the ground that these inspection changes would cause "all of the organization's time and resources spent advocating against NPIS [to have been] wasted." But these resource expenditures are precisely the normal activities of this sort of organization. Since the FSIS had not provided deceptive or untruthful information in a manner that would hinder the organization's operations, these costs cannot support standing. As Judge Henderson put it, the organization's 'only expenditures are made for 'pure issue-advocacy,' an insufficient injury to support standing under our precedent."

Judge Millett, concurring in the outcome, returned to the concerns about organizational standing that she had expressed in *People for the Ethical Treatment of Animals v. USDA*. Satisfied that the majority's opinion had kept a bad situation from getting worse, she nonetheless decried the "unwarranted disparity" that the Circuit's precedents seem "to have spawned between individuals' and organizations' ability to bring suit."

D.C. Cir. mixes ripeness and standing analysis to reject standing to challenge the makeup of an agency advisory committee

The tobacco industry recently challenged the makeup of an FDA Advisory Committee responsible for reporting on the safety of menthol cigarettes. At the time of the D.C. Circuit's decision in *R.J. Reynolds Tobacco Co. v. U.S. FDA*, 810 F.3d 827 (D.C. Cir. 2016), the Committee had issued its report, and the FDA had issued a Notice of Proposed Rulemaking with respect to menthol cigarettes. The FDA had not, however, adopted a final rule on that subject.

The industry alleged that three members of the Advisory Committee had illegal conflicts of interest because they had testified against the industry and were expected to be expert witnesses in the future. The industry claimed that this caused an increased risk of stricter regulation in the future, that there was a probability that these members would use confidential information obtained through the Advisory Committee to the detriment of the industry, and that there was a danger that these members would shape the Committee's report to favor their own work as expert witnesses against the industry. The District Court granted summary judgment for the industry, but the Court of Appeals denied standing, holding that the industry had not identified a cognizable injury in fact.

As to the alleged increased risk of adverse FDA regulatory action, the court assumed that such appointments would violate a procedural right intended to protect the industry's interests. In that circumstance, the industry could establish standing "even though he cannot establish with any certainty that [provision of the right] will cause the [agency action] to be withheld or altered." This low causation threshold is necessary because otherwise it would be impossible to protect such procedural rights. Nonetheless, the industry would have to demonstrate "a distinct risk to a particularized interest" and the injury would have to be sufficiently imminent.

Turning to ripeness doctrine for guidance on the issue of imminence, the court noted the Supreme Court's admonition that a claim is not sufficiently ripe "if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." In this case, it was not clear whether the FDA would even issue a final rule or what it would say, and the appointment of these particular members of the Committee did not render the issuance of a rule either probable or imminent. The FDA is required only to consider the rule, and the rule would have to be based on the relevant scientific information. Since the FDA might not ever issue the rule, any potential harm was not sufficiently imminent to support standing.

As to the alleged injury from the Committee members' misuse of confidential information, the court said that the industry had not "set forth by affidavit or other evidence specific facts suggesting that the challenged members have made or will make improper use of confidential information." They presented only the fact that the Committee members would have access to this information and the industry's fear that they would misuse it. But the courts hesitate to find standing where injury "depends on the unfettered choices made by independent actors not before the courts," particularly where the assertion depends upon illegal activity by those independent actors. These bare assertions and affronts to the integrity of the Committee members were not enough to demonstrate an imminent risk of harm.

Similarly, the industry had provided nothing beyond speculation to suggest that the Committee members would try to shape the report to support their own work. In the absence of evidence demonstrating that the "challenged members shaped the report to support their testimony, or used the report's concurrence in their views to validate those views," this speculation did not support standing.

D.C. Cir.—No industry intervention in a settlement agreement requiring an agency to proceed with rulemaking required by statute

Section 108 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) provides that the Environmental Protection Agency "shall promulgate" regulations requiring that industries subject to the Act "establish and maintain evidence of financial responsibility consistent with the degree and duration of risk associated with" their activities. After 30 years with no such regulations, environmental organizations challenged this delay and sought an order directing EPA to issue the regulations by January 1, 2016. EPA and the environmental organizations then jointly sought a consent order establishing an agreed-upon schedule for the financial responsibility rulemaking for certain industries. Industry interests sought to intervene.

In *In re Idaho Conservation League*, 2016 WL 363297 (D.C. Cir. 2016), the D.C. Circuit held that at least one environmental organization had standing based upon the interests of one of its members who was personally affected by the activities of the hardrock mining industry. Although these regulations would not directly affect pollutant emissions or similar hazards, the court found both causation and redressability. It had become common practice in the mining industry for some operators to avoid paying for environmental liabilities by going bankrupt. That situation gave them the incentive to avoid best practices and to take on greater risks knowing they would not need to bear the costs created by those risks. The

imposition of financial responsibility regulations would reduce those adverse incentives. Moreover, the absence of financial assurance regulations meant that many cleanups had to be handled by the federal government, with cleanup proceeding "at a slower rate than it would if fully funded." The court upheld the standing of environmentalists challenging other industries for similar reasons.

The court denied standing to industry interests seeking to intervene with respect to the joint motion for a consent order. Since the order would require only that EPA follow a certain timeline in pursuing the rulemaking and deciding whether to promulgate a new rule, it did not affect the substance of the rule and therefore did not cause injury to industry interests. In particular, industry interests had not pointed "to authority that the proposed one-year period for notice-and-comment is so short that it would necessarily harm them." Once EPA publishes the proposed rule, industry interests will have an opportunity to comment, and they will be able to challenge the rule once it is issued.

Chief Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit (far left) spoke to the Council January 2016 quarterly meeting. Among other things, Chief Judge Katzmann, a former Section committee chair, discussed aspects of his recent book Judging Statutes. *Left to right: Chair-elect Renée Landers, last retiring chair Anna Shavers, Hon. Edward Shoenbaum.*

Administrative Conference Study: Self-Represented Parties in Administrative Hearings

*Connie Vogelmann**

Last September, President Obama formally established the Legal Aid Interagency Roundtable (LAIR), encouraging federal agencies to collaborate in order to increase access to justice for Americans as they interact with federal agencies. The President's memorandum formalized the activities of LAIR, which began meeting a year and a half before the memorandum was signed. In his memorandum, the President emphasized the importance of access to justice in American life, writing:

> This Nation was founded in part on the promise of justice for all. Equal access to justice helps individuals and families receive health services, housing, education, and employment; enhances family stability and public safety; and secures the public's faith in the American justice system.

Under the umbrella of LAIR, the Administrative Conference of the United States (Conference) and the Department of Justice's Office for Access to Justice co-lead a working group focusing on just one aspect of access to justice—that of self-represented parties in administrative hearings. The working group began meeting in April 2015, and over the past year members have shared information on how self-represented parties navigate each agency's administrative hearings processes. Working group members have learned about the practices and procedures used by other agencies to accommodate self-represented parties, and have studied the techniques adopted by civil courts to handle pro se claimants.

As a result of the working group, the Conference has decided to undertake a project on Self-Represented Parties in Administrative Hearings. The project will explore agency procedures related to self-represented parties and make recommendations for best practices to agencies, especially as they relate to fairness and efficiency. The project report is expected to be completed in the fall of 2016 and submitted to the Assembly for its consideration at the December 2016 Plenary Session.

The topic of representation in legal matters is not a new topic of discussion. In 1963, the Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), famously held that indigent criminal defendants in state courts have a right to representation. In subsequent decades the number of claimants appearing pro se in civil suits has increased, and commentators have expressed two major concerns with this trend. First, many have argued that typical court procedures and rules of evidence prevent claimants from effectively arguing their cases, thereby depriving them of justice. Second, increasing numbers of pro se claimants raise potential problems with efficiency, and many have observed that pro se claimants consume more court resources than their represented counterparts. In response, many civil courts have implemented a range of "self-help" measures for pro se claimants, including help desks and other sources of guidance.

Although administrative hearings differ in important ways from civil lawsuits, they are also subject to many of the same concerns. Administrative hearings may have relaxed rules of evidence and procedure when compared to civil courts, but navigating the administrative hearing process can still be extremely challenging for self-represented parties. Unlike in the civil courts, self-representation has been little studied in the administrative context, especially at the federal level.

Many parties go through federal administrative hearings each year without representation. For example, even though almost 80% of parties in hearings before the Social Security Administration have some representation, over 150,000 parties each year are entirely self-represented, and many more have representation for only part of their proceeding. The presence of self-represented parties may raise concerns about the fairness of the proceedings.

The extent to which agencies have taken steps to address self-representation varies significantly from one agency to another. Some agencies have taken significant steps to aid self-represented parties, by placing special duties on adjudicators, creating "plain language" forms, or providing other self-help resources. Other agencies have made relatively few accommodations for self-represented parties, or their treatment of self-represented parties remains largely unknown outside the agency. Even when agencies have put steps in

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place to aid self-represented parties, there has been relatively little analysis of the effectiveness of these measures.

The Conference's study seeks to investigate how agencies handle self-represented parties, and fill in existing knowledge gaps. In conducting this study, the Conference makes no normative judgment on the presence of self-represented parties in administrative hearings; however, given that self-represented parties are present in administrative hearings, this project seeks to identify innovations that both facilitate effective self-representation and conserve agency resources. Part I of the study will research agencies that conduct large number of hearings, focusing on the Social Security Administration, Board of Veterans' Appeals, Executive Office for Immigration Review, and the Internal Revenue Service. Part II of the study will focus on federal administrative agencies that do not conduct their own hearings, and instead delegate hearing authority to state or local entities. This second part of the study will focus on the Department of Health and Human Services, Department of Housing and Urban Development, and components of the Department of Agriculture.

Both Part I and Part II of the study will take a comprehensive look at administrative hearings, gathering information on self-representation from a range of sources. First, the Conference will send out surveys to agency representatives, requesting input from both agency adjudicators and administrators involved with hearings. Questions will address self-representation broadly, and focus on several topics, including:

- Self-represented party demographics
- Reasons for self-representation and changes in representation over time
- Effect of self-representation on adjudicators, hearing offices, and hearing outcomes
- Current agency resources aiding self-represented parties
- Future or desired resources for handling self-represented parties

The Conference will also look to agency statutes, regulations, and guidance, studying both formal and informal instruction pertaining to self-representation. The Conference's study will also include discussions with various access to justice and claimant organizations, and an analysis of the legal literature studying self-representation and pro se claimants, in both the administrative hearing and civil court contexts. The study aims to identify which innovations have been most useful in civil courts, and also identify which practices might be most transferable to administrative agencies.

The Conference's study will be researched in-house by Attorney Advisor Connie Vogelmann. Please feel free to reach out to her with questions or comments at cvogelmann@acus.gov.

Family members and colleagues honor three ACUS lawyers whom Justice Scalia had just sworn into the Supreme Court bar. Left to right: Justice Breyer, Carrie Wilkes, Shawne McGibbon (ACUS), Justice Scalia, Adrian McGibbon, then-ACUS Chair Paul Verkuil, Mike McCarthy (ACUS), Reeve Bull (ACUS).

Recent Articles of Interest

Edited by William Funk[*]

Symposium: Legislation/Regulation and the Core Curriculum, 65 J. Legal Educ. 3 (2015). James Brudney, *Legislation and Regulation in the Core Curriculum: a Virtue or a Necessity?*; Kevin M. Stack, *Lessons from the Turn of the Twentieth Century for First-year Courses on Legislation and Regulation*; John F. Manning and Matthew Stephenson, *Legislation & Regulation and Reform of the First Year*; Dakota S. Rudesill, Christopher J. Walker, and Daniel P. Tokaji, *A Program in Legislation*; Denorah A. Widiss, *Making Sausage: What, Why and How to Teach about Legislative Process in a Legislation or Leg-reg Course*; Abbe R. Gluck, *The Ripple Effect of "Leg-reg" on the Study of Legislation & Administrative Law in the Law School Curriculum.*

Symposium: Through the Lens of Time: Global Administrative Law After 10 Years, 13 I·Con: Int'l J. Const. L. 463 (2015). J.H.H. Weiler, *GAL at a Crossroads: Preface to the Symposium*; Sabino Cassese, *Global Administrative Law: the State of the Art*; Christoph Mollers, *Ten Years of Global Administrative Law*; Lorenzo Casini, *Beyond Drip-painting? Ten Years of GAL and the Emergence of a Global Administration*; Benedict Kingsbury, *Three Models of "Distributed Administration": Canopy, Baobab, and Symbiote*; Giulio Napolitano, *Going Global, Turning Back National: Towards a Cosmopolitan Administrative Law?*; Edoardo Chiti, *Where Does GAL Find its Legal Grounding?*; Mario Savino, *What If Global Administrative Law Is a Normative Project?*; Richard B. Stewart, *The Normative Dimensions and Performance of Global Administrative Law.*

Eric C. Ip, *Doctrinal Antithesis in Anglo-American Administrative Law*, 22 Sup. Ct. Econ. Rev. 147 (2015). English administrative law guards judicial supremacy over all matters of statutory interpretation, while instructing judges to refrain from scrutinizing administrators' factual findings. By contrast, American federal courts are obliged to respect agencies' statutory-interpretive autonomy, but take a rigorous "hard look" at substantial agency factual determinations. This Article argues that the antithetical approaches to judicial review of administrative action adopted by the apex courts of the United Kingdom and the United States can be adequately explained by the polarization of these two polities along a spectrum of effective vetogates.

Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 Ga. L. Rev. 757 (2015). One of the most significant characteristics of the modern administrative state is almost never talked about—in many respects, the formal structure governing how administrative law works has not changed that much in two decades. Unlike past eras of radical upheaval, the key institutions, statutes, and doctrines that survived and emerged in the 1980s and early `90s remain remarkably intact today. Given this repose, it is tempting to think that there also will not be major changes in the future. But is that so? Introducing a new framework for visualizing the interconnected way in which change occurs in administrative law, this Article submits that the equilibrium that defines administrative law today is too precarious to be permanent. While the last two decades have been stable, at least three dynamics are poised to change today's balance: Partisan Escalation, Regulatory Competence, and New Protectionism.

Cass R. Sunstein, *"Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, U. Chi. L. Rev. (forthcoming), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2697804. Over the last two decades, lower courts have repeatedly held that agencies must use notice-and-comment procedures before they issue purported policy statements that are "practically binding," in the sense that they are fixed and firm. As a matter of policy, this requirement has both desirable and undesirable consequences. It increases the likelihood that agencies will benefit from public comments, but it also creates a strong incentive for agencies to speak vaguely or not to issue policy statements at all. The requirement therefore has epistemic advantages while also encouraging open-ended standards rather than clear rules. As a matter of law, the practically binding test is an unjustified departure from the best reading of the APA. The Supreme Court's decision in *Vermont Yankee* rules that departure out of bounds. It is true that *Vermont Yankee* suggests an approach that would revolutionize a large number of existing doctrines and that for good reasons, the Court has declined to endorse the full *Vermont Yankee*-ization of administrative law. But the practically binding test is beyond the pale.

Cynthia R. Farina and Gillian Metzger, *Introduction: The Place of Agencies in Polarized Government*, 115 Colum. L. Rev. 1683 (2015). Political polarization has become a major focus in contemporary discussions on congressional activity and governance. The tone of these discussions has grown increasingly grim, as many political scientists argue that a constitutional system of divided and shared powers hardens current levels of partisan warfare into legislative gridlock. Proposals for reform abound. Scholars and political commentators have called for modifications to the electoral process and to party structure, for additional oversight of the culture among members of Congress, and for increased attention to demographics and economic inequality within the electorate. These proposals sometimes conflict, and usually face daunting legal or political obstacles to adoption. In

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an effort to better assess the likelihood that congressional dysfunction will be the norm going forward, this Essay reviews and synthesizes recent political science literature with the goal of sorting out what we know—and, perhaps more important, do not know—about the nature, extent, and causes of congressional polarization. The Essay begins by discussing standard metrics of congressional polarization and describing alternative approaches that challenge the standard account as overly simplistic. It then looks at historical trends to consider whether the contemporary situation is truly anomalous. Next, it considers the many theories put forth to explain the phenomenon, focusing initially on whether congressional polarization can be explained by polarization in the electorate and then moving to proposals around the electoral process, party structure and culture, and demographics. Finding little support in the literature for the notion that the challenged structures and practices are actually driving legislative polarization, the Essay concludes by suggesting that the rhetoric around congressional polarization—particularly around the likely continuation of partisan warfare and legislative gridlock—is far more negative than the existing evidence can justify.

Michael Herz, Chevron *is Dead; Long Live* Chevron, 115 Colum. L. Rev. 1867 (2015). The Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC* continues to obsess academics and courts alike. Despite all the attention, however, the "*Chevron* revolution" never quite happens, and the close of the Supreme Court's 2014-15 Term was full of hints of new judicial skepticism about excessive judicial deference to agency decisions. So we have a decision that is seen as transformatively important but that is honored in the breach, in constant danger of being abandoned, and the subject of perpetual confusion and uncertainty. The Article begins by describing *Chevron* as a form of self-regulation. That feature alone is enough to explain why it has not taken over the world and will never do so. The Article then lays out a basic understanding of *Chevron*, focusing on the distinction between *Chevron* and the quite different model of deference exemplified by *Skidmore v. Swift*. The argument here is for a reading of *Chevron* that is both weaker and stronger than that often proposed. On the one hand, courts retain an essential and meaningful role in determining the boundaries of what Peter Strauss has labeled "*Chevron* space"; they have real work to do. On the other hand, in doing that work, the views of the agency can never be ignored; in doctrinal terms, *Skidmore* applies within step one. These principles are explicated in part by reviewing the vocabulary of *Chevron* doctrine. This part concludes by placing *Chevron* in a jurisprudential framework that draws on the distinction between "interpretation" and "construction." That distinction, or something like it, maps onto and helps elucidate the distinction between step one and step two. Courts have ultimate authority over interpretation but yield to agency construction. Part III applies the framework developed in Part II to the Supreme Court's 2013 decision in *City of Arlington v. FCC*, which held that *Chevron* applies to agency determinations going to their own jurisdiction. The majority and the dissent in that case were both correct, making *City of Arlington* that rare creature, a unanimous 6-3 decision. *Chevron* is not a revolutionary shift of authority from the judiciary to the executive. That *Chevron* is dead. The *Chevron* that survives is an appropriate allocation of decisionmaking responsibility among the three branches, relying on the judiciary to enforce congressional decisions, but protecting agency authority and discretion where Congress has left the decision to the executive. Long may it reign.

William Funk, *Make My Day! Dirty Harry and Final Agency Action*, 46 Env. L. (forthcoming), available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2716370. In 1971 Clint Eastwood starred in the movie Dirty Harry, in which he plays a policeman, Harry Callahan. The movie begins and ends with Harry, gun in hand, facing a wounded gunman who has a gun within reach after an extended gun battle. It is not clear whether Harry still has any bullets left in his gun, so Harry asks the gunman, "You've got to ask yourself one question: `Do I feel lucky?'" In the first instance, the gunman surrenders only to find that Harry was indeed out of bullets; in the second instance, the gunman goes for his gun, and Harry shoots him dead. In a later movie, in a similar situation Harry simply says "Go ahead, make my day." The gunman surrenders. What does this have to do with "final agency action"? When the Environmental Protection Agency (EPA) issued a compliance order to the Sacketts claiming that they were violating the Clean Water Act (CWA) by placing fill on their property without a permit, it was like Harry pointing the gun at the bad guy. If the Sacketts felt lucky, they could ignore the order and await EPA's enforcement of the order. Then, if the Sacketts were right, and they were not violating the CWA, they would be free, but if they were wrong, and EPA was correct, then they would be subject to possible criminal penalties or significant civil fines. Trying to avoid this dilemma, the Sacketts sought judicial review of the compliance order. The government, however, argued among other things that the order was not "final agency action" under the Administrative Procedure Act (APA) and therefore was not reviewable. The Supreme Court unanimously rejected that argument, finding the order final agency action, in effect denying EPA the ability to extort compliance with its

orders. Currently pending before the Supreme Court is another case, *U.S. Army Corps of Engineers v. Hawkes Co.* In that case the Corps of Engineers had issued a formal Jurisdictional Determination (JD) that certain property was wetlands subject to its jurisdiction. The property owners disagreed, but, like the property owners in *Sackett*, they faced a dilemma. If they ignored that determination, awaited enforcement against their development of their property, and were correct, they would be free, but if the Corps was correct, they would be subject to potential criminal penalties or significant civil fines. So Hawkes sought judicial review, but the government, as it had in *Sackett*, argues that the Corps' JD is not final agency action under the APA and therefore not judicially reviewable. The Eighth Circuit in *Hawkes*, contrary to decisions in both the Fifth and Ninth Circuit, held the JD to be final agency action subject to review. The Supreme Court will in *Hawkes* resolve this split. This Article will explain how and why the Supreme Court should affirm the *Hawkes* decision, but it will suggest that this case presents a perfect opportunity for the Court to clarify what is necessary to constitute final agency action subject to judicial review under the APA more generally. Part II of this Article describes how the CWA regulates the discharge of fill into the "waters of the United States" and how the Supreme Court has interpreted the extent of the jurisdiction of the CWA. It then explains the process by which the Corps issues its Jurisdictional Determinations. Part III describes how the Supreme Court has interpreted "final agency action" under the APA and how the circuits have applied that doctrine to challenges of Jurisdictional Determinations. Part IV presents how the Court is likely to resolve the split in the circuits over the reviewability of Jurisdictional Determinations. Part V concludes the Article.

Cass R. Sunstein and Adrian Vermeule, *The Unbearable Rightness of* Auer, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737. For more than seventy years, courts have deferred to reasonable agency interpretations of ambiguous regulations. The *Auer* principle, as is it is now called, has attracted academic criticism and some skepticism within the Supreme Court. But the principle is entirely correct. In the absence of a clear congressional direction, courts should assume that because of their specialized competence, and their greater accountability, agencies are in the best position to decide on the meaning of ambiguous terms. The recent challenges to the *Auer* principle rest on fragile foundations, including an anachronistic understanding of the nature of interpretation, an overheated argument about the separation of powers, and an empirically unfounded and logically weak argument about agency incentives, which exemplifies what we call "the sign fallacy."

Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=2720970. Although expertise has a starring role in administrative law, there has been a surprisingly impoverished understanding of expertise and its role in the rulemaking process. The failure to understand expertise, which this Article explains is more complex and multifaceted than generally understood, is problematic because understandings of expert public administration influence administrative law institutions and practices, and conversely these legal developments condition the creation and use of expert knowledge in public administration. This Article contends that a more complete understanding of expertise indicates how it is possible to have a more workable, and yet accountable, administrative process. More specifically, the Article explains how the limited and sometimes misleading understanding of expertise has led to a "rational-instrumental" accountability paradigm, which distrusts agency expertise and seeks to narrow the policy space in which agency expertise can operate. A more accurate and complete understanding of expertise supports "deliberative-constitutive" accountability, which has the potential to increase agency effectiveness and still reconcile the administrative state with our constitutional democracy.

Max Minzner, *Should Agencies Enforce?* 99 Minn. L. Rev. 2113 (2015). This Article explores an important but understudied structural choice: the decision to vest enforcement authority in administrative agencies. Each year, agencies routinely bring enforcement actions producing billions of dollars in civil penalties and industry-reshaping consent decrees. Where do they get this power? Congress grants enforcement authority to administrative agencies because it believes that agency subject matter expertise will generate appropriate enforcement choices. Similarly, the Supreme Court has strongly deferred to agency enforcement because it sees it as intimately intertwined with other agency regulatory decisions. Scholars have also generally taken for granted that specialist agencies will be enforcement experts because they are experts in their industry. We assume enforcement expertise follows regulatory expertise. Does it? This Article argues, contrary to the conventional wisdom, that enforcement itself is a specialization. While enforcement choices have aspects that are subject-matter specific, other components, particularly the effective exercise of prosecutorial discretion, are independent of the industry regulated. As a result, giving enforcement authority to a specialized agency rather than a generalist enforcer like the

Department of Justice involves a decision to select one form of expertise over another. Similarly, the choice requires selecting between the structural strengths and weaknesses that come with enforcement specialization. Political pressures on specialized enforcers and the narrow scope of their authority produce undesirable effects on enforcement outcomes. However, specialist agencies have a wider range of alternatives and bring a deeper understanding of industry norms to the enforcement process than a generalist enforcer. These comparative strengths and weaknesses of generalist and specialist enforcement provide important lessons for legislators, judges, and agencies. Congress needs to consider the enforcement tradeoff when determining the scope of agency enforcement authority. Courts should recognize these costs and benefits in setting the level of deference to enforcement decisions. Finally, agencies themselves should recognize their strengths and weaknesses in coordinating enforcement choices.

Adrian Vermeule, *Optimal Abuse of Power*, 109 Nw. U. L. Rev. 673 (2015). This Article argues that in the administrative state, in contrast to classical constitutional theory, the abuse of government power is not something to be strictly minimized, but rather optimized. An administrative regime will tolerate a predictable level of misrule, even abuse of power, as the inevitable byproduct of attaining other ends that are desirable overall. There are three principal grounds for this claim. First, the architects of the modern administrative state were not only worried about misrule by governmental officials. They were equally worried about "private" misrule—misrule effected through the self-interested or self-serving behavior of economic actors wielding and abusing power under the rules of the 18th-century common law of property, tort, and contract. The administrative state thus trades off governmental and "private" misrule. Second, the rate of change in the policy environment, especially in the economy, is much greater than in the late 18th century—so much greater that the administrative state has been forced, willy-nilly, to speed up the rate of policy adjustment. The main speeding-up mechanism has been ever-greater delegation to the executive branch, accepting the resulting risks of error and abuse. Third, the costs of enforcing legal rules against executive officials are necessarily positive and plausibly large, in part because any institutional monitors created to detect and punish abuses must themselves be monitored for abuse. The architects of the administrative state believed that a government that always forms undistorted judgments, and that never abuses its power, will do too little, do it too amateurishly, and do it too slowly. In that sense, the administrative state constantly gropes towards an institutional package solution that embodies an optimal level of abuse of power.

Sanne H. Knudsen and Amy J. Wildermuth, *Unearthing the Lost History of* Seminole Rock, 65 Emory L.J. 47 (2015). In 1945, the Supreme Court blessed a lesser-known type of agency deference in *Bowles v. Seminole Rock*. Also known as *Auer* deference, it affords deference to agency interpretations of their own regulations. Courts regularly defer to agencies under this doctrine, regardless of where the interpretations first appear or how long-standing they are. Recently, members of the Supreme Court have signaled a willingness to reconsider, and perhaps jettison, *Seminole Rock*. This Article supports this kind of reconsideration. *Seminole Rock* has been widely accepted but surprisingly disconnected from any analysis of its origins and justifications. This Article—the first historical explication of *Seminole Rock* deference—argues that *Seminole Rock* cannot support the theoretical weight that subsequent courts and evolving administrative law doctrines have complacently put upon it. *Seminole Rock* was the product of its time—the 1940s, an era of war-time price controls and a new age of administrative law. Later cases wrongly divorced *Seminole Rock* from that context.

This Article documents the untethering of *Seminole Rock*. It shows how, in the 1960s and 1970s, alongside an expanding administrative state, the doctrine transformed into a more mechanical and highly deferential form of agency deference. It further shows that this transformation is marked by a consistent lack of scholarly or judicial reflection on its underpinnings. In doing so, this Article provides new depth to the emerging critiques of *Seminole Rock* deference and lends critical support for reexamination of the doctrine.

Jennifer Nou, *Regulatory Textualism*, 65 Duke L.J. 81 (2015). This Article proposes a textualist approach to regulatory interpretation. Regulatory textualism, however, should be distinct from statutory textualism. Judges should interpret regulations armed not with dictionaries or other general linguistic aids, but rather with a hierarchy of sources that sheds light on the text's public meaning. Methodologically, this approach tailors positive political theory insights to the rulemaking process. That process features a number of pivotal actors, or vetogates, who must sign off on a regulation before it can proceed. The court's interpretive task is to privilege those statements that are more likely to be credible—sincere, not strategic—reflections of the text's public meaning. Specifically, the judge should first consider the preamble's provision-by-provision explanations, which frequently respond to public comments raising potential ambiguities. If ambiguity persists, the judge should then consult the regulatory analyses, which predict the rule's consequences under specific factual scenarios. Both congressional and presidential vetogates, as well as the public more generally,

rely on these analyses when engaging with the regulatory process. Finally, if these materials conflict, the court should then defer to the agency's interpretation—provided that the agency provides a reasoned explanation. In this manner, regulatory textualism asks how the reasonable reader of a rule would have understood its meaning as negotiated by the President, Congress, and other politically legitimate actors.

Nadelle Grossman, *The Sixth Commissioner*, 49 Ga. L. Rev. 693 (2015). The federal securities laws grant broad rulemaking authority to the Securities and Exchange Commission (SEC). In promulgating rules, the SEC must not only ensure that its rules protect investors and the public interest, but also consider the effects of its rules on efficiency, competition, and capital formation (the ECCF mandate). However, the SEC's rulemaking authority has recently been frustrated. In two decisions striking down SEC rules, the D.C. Circuit held that the ECCF mandate requires a quantitative cost-benefit analysis. This contrasts with the SEC's historic practice of qualitatively assessing the effects of its rules. While these D.C. Circuit decisions have been criticized for applying an inappropriately high standard of review to SEC rulemaking, this Article identifies a more fundamental problem with these decisions: they interfere with the SEC's power to administer the securities laws. This interference frustrates administrative law principles that lie at the heart of the division of power among the three branches of government. Requiring the SEC to engage in a quantitative analysis in rulemaking is especially troubling in a context where the SEC must pass numerous rules under the Dodd-Frank and JOBS Acts. These analyses will surely fail to capture the unquantifiable effects of SEC rules, such as their effect on firm wealth-creating strategic management processes. For these reasons, this Article urges the SEC to exert its authority under securities laws and issue an explicit interpretation of the ECCF mandate in a way that best captures the full impact of its rules.

Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. Pitt. L. Rev. 209 (2014). Section 5 of the Federal Trade Commission (FTC) Act makes "unfair methods of competition" illegal and gives the FTC authority to enforce this proscription. The term "unfair method of competition" is undefined by the statute—indeed, Congress deliberately left the term ambiguous in order that judicial construction of the term would not prevent the FTC from restraining such conduct. Ordinarily, one would expect that courts would defer to agency interpretations of such inherently and deliberately ambiguous terms—this is a very clear case for *Chevron* deference. Remarkably, however, the FTC has relied exclusively upon judicial construction of the term (viz., that proscription of "unfair methods of competition" allows the FTC to enforce antitrust laws as defined by the Sherman and Clayton Acts). Indeed, there is widespread consensus within the antitrust bar that *Chevron* does not apply to FTC interpretations of Section 5. This Article explores the origins of this folk knowledge—how the antitrust bar has gotten things so wrong—and the implications this has for FTC enforcement of Section 5. In so doing, this Article makes three distinct contributions. First, it explains that *Chevron* does apply to FTC interpretations of Section 5. This is practically very important today due to ongoing debate over the proper scope of Section 5, particularly in the high-technology and information industries. Understanding that *Chevron* largely allows the FTC to define this scope is important for participants on both sides of this debate. Second, this Article argues normatively that *Chevron* deference compounds already serious jurisprudential questions about the agency's recently aggressive and informal approach to competition issues, and considers possible limits on a *Chevron*-supercharged Section 5. And third, this Article provides a useful case study in how misunderstandings of the law propagate, and serves as a stark reminder of the need for different groups of lawyers—especially those who are highly specialized—to know the limits of their own expertise.

William E. Kovacic and Marc Winerman, *The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness*, 100 Iowa L. Rev. 2085 (2015). On March 16, 1915, the FTC opened for business and began what has proven to be a uniquely compelling experiment in economic regulation. The FTC was the first law enforcement agency to be designed "from the keel up" as a competition agency. One vital consideration in forming the new institution was to define its relationship to the political process. Among other features in the original FTC Act, Congress provided that the agency's commissioners would have fixed, seven-year terms and that a commissioner could be removed during his or her term only for cause. Through these and other design choices, Congress created what would come to be known as the world's first "independent" competition agency. The FTC's degree of insulation from direct political control supplied an influential model of institutional design and contributed to the acceptance of a norm, evident in modern commentary about competition law, that public enforcement agencies should be politically independent. This Essay examines the relationship of competition agencies to the political process. It uses the experience of the FTC to address three major issues. First, what does it

mean to say that a competition agency is "independent"? Second, how much insulation from political control can a competition agency achieve in practice? Third, how is the pursuit of political independence properly reconciled with demands that a competition agency be accountable for its decisions—an important determinant of legitimacy—and with the need to engage with elected officials to be effective in performing functions such as advocacy?

Jennifer A. Brobst, *Reverse Sunshine in the Digital Wild Frontier: Protecting Individual Privacy Against Public Records Requests for Government Databases*, 42 N. Ky. L. Rev. 191 (2015). In the present Digital Age, the American government engages in mass collection of information about individuals, and the databases with their layers of metadata that contain the information are then potentially subject to public disclosure pursuant to State and Federal Sunshine laws. In essence, what is occurring is a Reverse Sunshine effect, in which the lives of individuals, at times, are made more transparent than government action. North Carolina is the latest of a small number of states addressing the daunting question whether a single public records request may require production of a copy of an entire government database, potentially containing massive collections of individual information. While the North Carolina Supreme Court, like its sister states, managed to avoid directly answering the question, the specter of drastically increased commercial and individual access to government databases warrants caution. Until governmental agencies are better able to properly maintain and comply with public records requests for mass digital information, the risk of unwarranted disclosure of private information is great and the existing individual remedies and protections slight. Thus, it is timely to consider pragmatic and legislative solutions to more effective and tailored compliance with public records requests in the Digital Age, to empower individuals to enforce their right to privacy and to gain lawful access to public records.

Mathew J.B. Lawrence, *Procedural Triage*, 84 Fordham L. Rev. 79 (2015). Prior scholarship has assumed that the inherent value of a "day in court" is the same for all claimants, so that when procedural resources (like a jury trial or a hearing) are scarce, they should be rationed the same way for all claimants. That is incorrect. This Article shows that the inherent value of a "day in court" can be far greater for some claimants, such as first-time filers, than for others, such as corporate entities and that it can be both desirable and feasible to take this variation into account in doling out scarce procedural protections. In other words, it introduces and demonstrates the usefulness of procedural triage. This Article demonstrates the real world potential of procedural triage by showing how Medicare should use this new tool to address its looming administrative crisis. In the methodological tradition of Jerry Mashaw's seminal studies of the Social Security Administration, this Article uses its in-depth study of Medicare to develop a theoretical framework that can be used to think through where and how other adjudicatory processes should engage in procedural triage. This Article concludes by applying this framework to survey other potential applications for procedural triage, from the Department of Veterans' Affairs to the Federal Rules of Civil Procedure.

J.B. Ruhl and James Salzman, *Regulatory Exit*, 68 Vand. L. Rev. 1295 (2015). Exit is a ubiquitous feature of life, whether breaking up in a marriage, dropping a college course, or pulling out of a venture capital investment. In fact, our exit options often determine whether and how we enter in the first place. While legal scholarship is replete with studies of exit strategies for businesses and individuals, administrative law scholarship has barely touched the topic of exit. Yet exit plays just as central a role in the regulatory state as elsewhere—welfare support ends, government steps out of rate-setting. In this Article, the authors argue that exit is a fundamental feature of regulatory design and should be explicitly considered at the time of program creation. Part II starts from first principles and sets out the basic features of regulatory exit. It addresses the design challenges of exit strategies and how to measure success of exit.

With these descriptive and normative foundations in place, Part III develops a framework that explains the four basic types of regulatory exit strategies, exploring the political economy that determines each strategy and explaining when policy makers are most likely to adopt them. To demonstrate its usefulness in practice, the framework is applied as a case study in Part IV to the emerging challenge of fracking. It concludes by describing a new exit strategy model for regulatory design, a hybrid approach of "Lookback Exit."

Laurance Tai, *Fast Fixes for FOIA*, 52 Harv. J. on Legis. 455 (2015). The effectiveness of the Freedom of Information Act has been hindered throughout its history by delays in processing requests, questionable denials of information, and a dominance of commercial requests. Using an economic approach, this Article argues that cost asymmetries drive these difficulties: agencies incur high costs compared to entities that file requests (requesters) at the processing stage, whereas requesters have high costs relative to agencies at the judicial review stage. To mitigate these asymmetries, this Article proposes three relatively simple changes that would markedly improve its implementation: allowing agencies to retain processing fees, increasing these fees, especially for commercial and

expedited requests, and strengthening FOIA's attorney fee-shifting provisions. This Article contends that these "fast fixes" for FOIA would more effectively strengthen government transparency than the significantly more complex legislation that Congress has recently considered.

Michael P. Healy, *Means and Ends in* City of Arlington v. FCC: *Ignoring the Lawyer's Craft to Reshape the Scope of Chevron Deference*, 76 U. Pitt. L. Red. 391 (2015). The United States Supreme Court considered the question of the scope of *Chevron* deference in *City of Arlington v. FCC*. This Article discusses how the decision is an example of the work of an activist Court. The case should have been resolved by a straight forward determination under the analysis of *United States v. Mead* that *Chevron* deference simply did not apply to the Federal Communications Commission's (FCC) legal determination. The Court ignored this restrained approach to the case and instead addressed the question the Justices desired to decide: the reach of *Chevron* deference. The Article discusses and criticizes the approach of Justice Scalia writing for the majority and of Chief Justice Roberts writing for three dissenting Justices. Practitioners and scholars of administrative law can only be confused by the Court's willingness to apply *Chevron* in *City of Arlington*, given the informal administrative action being reviewed and the fact that neither reviewing court actually applied each of the two parts of the *Mead* test. The Court's flawed administrative law analysis results from the activist concerns of Justice Scalia and Chief Justice Roberts. Justice Scalia uses the case as a vehicle to undermine *Mead*, a decision that Justice Scalia loathed. Chief Justice Roberts uses the case as a vehicle to advocate for less judicial deference and less law defining power for increasingly powerful agencies. Neither member of the Court allowed the applicable rules of contemporary administrative law to hinder his efforts to achieve his broader goals. Administrative law would have been better served if a properly restrained Court had considered and applied the previously determined rules for judicial review of administrative agencies.

Debmallo Shayon Ghosh, *"Inquiries That We Are Ill-Equipped to Judge": Factfinding in Appellate Court Review of Agency Rulemaking*, 90 N.Y.U. L. Rev. 1269 (2015). Recognizing the need for a check on agencies' discretion, Congress has assigned the task of reviewing agency rulemaking to the judiciary. Yet, by allocating much of that review directly to appellate courts, Congress has forced them to find facts. For example, when deciding challenges to a rule that an agency has promulgated, these courts must often hear for the first time plaintiffs' evidence about factors that the agency failed to consider. When deciding challenges to an agency's failure to act, they must weigh the plaintiffs' proof about the consequences of the delay against the factual explanation the agency offers for its inaction. And, in any of these challenges, appellate courts may have to rule on facts related to standing. At best, because appellate courts typically lack the tools and institutional experience to conduct factfinding effectively, Congress has unduly burdened these courts and magnified the risk of inaccuracy. At worst, it has created incentives for appellate courts to defer to agencies and thereby weakened the entire institution of judicial review. The solution is simple: Congress should return these factfinding responsibilities to district courts.

Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 Yale J. on Reg. 257 (2015). The Federal Reserve System has come to occupy center stage in the formulation and implementation of national and global economic policy. And yet, the mechanisms through which the Fed creates that policy are rarely analyzed. Scholars, central bankers, and other policymakers assume that the Fed's independent authority to make policy is created by law—specifically, the Federal Reserve Act, which created removability protection for actors within the Fed, long tenures for Fed Governors, and budgetary autonomy from Congress. This Article analyzes these assumptions about law and argues that nothing about Fed independence is as it seems. Removability protection does not exist for the Fed Chair, but it exists in unconstitutional form for the Reserve Bank presidents. Governors never serve their full fourteen-year terms, giving every President since FDR twice the appointments that the Federal Reserve Act anticipated. And the budgetary independence designed in 1913 bears little relation to the budgetary independence of 2015. This Article thus challenges the prevailing accounts of agency independence in administrative law and central bank independence literature, both of which focus on law as the basis of Fed independence. It argues, instead, that the life of the Act—how its terms are interpreted, how its legal and economic contexts change, and how politics and individual personalities influence policymaking—is more important to understanding Fed independence than the birth of the Act, the language passed by Congress. The institutions of Federal Reserve independence include statute, but not only the statute. Law, conventions, politics, and personalities all shape the Fed's unique policy-making space in ways that scholars, central bankers, and policy-makers have ignored.

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