2002 Administrative Law Conference
Washington, DC
October 17-19, 2002
As I begin my year as Chair of the Section of Administrative Law and Regulatory Practice, I want to thank all of the members who have offered their help to me over the past few months. One thing that quickly became evident to me is that the Section needs support from a large number of people to meet the needs of our membership and accomplish the goals we set in our long-range planning.

According to ABA surveys, many attorneys join the ABA for the publications and educational programs; they are not interested in attending section business meetings and participating in the various debates over resolutions. Our Section leadership recognizes this. We are quite proud of the valuable programs we present at our four business meetings, as well as in between those meetings. We had over 500 people attend our fall 2001 Administrative Law Conference and often have 100 –200 people at other programs. This year we intend to expand the opportunities for those who can not attend programs in cities other than their own by signing a contract with Westlaw to tape our programs and make them accessible via the internet.

We are also quite proud of our publications. Our law review is the most widely distributed student-edited journal in the United States. The quality and timeliness of the articles are exceptional. Our quarterly magazine contains valuable information ranging from summaries of recent court decisions and journal articles to thought provoking pieces on current issues; we expect to expand the magazine this year to make it even more informative. In addition, we are aiming to increase the number of committees that prepare newsletters covering issues of specific interest to their members. We are also increasing the number of Section books and monographs. For example, one on “The Cost-Benefit State: The Future of Regulatory Protection,” by renowned author Cass R. Sunstein, was just published, and others on Medicare coverage and on the adjudicatory process will be out shortly.

Even though you may not want to be more involved in the Section, I strongly encourage you to at least attend our quarterly business meetings for the debates on substantive issues, as well as the valuable contacts you can make. Often, the work of the Section may be directly related to your job. Discussions or recommendations considered during business meetings may involve the very subjects on which you are working, such as recent court decisions or pending legislation. Your participation may provide you with the opportunity to work closely with others, offering valuable insight into their perspective and allowing you to learn from their experience and research. The educational and professional development opportunities, the valuable contacts, and the exposure that participation in our Section provides should justify your participation.

One thing that impressed me when I first joined the Section was that no matter how contentious or difficult the issues may appear in the various Section debates on resolutions, in the end, the merits of the arguments were what mattered. That approach to the debates often allows for development of reasonable compromises that may be used to address complex problems. Indeed, for many, the debates provide an opportunity to learn from the excellent arguments presented on the different sides of an issue. It has enabled us to be an important and valuable part of the ABA and to produce a large number of resolutions for adoption by the House of Delegates. I want to foster an atmosphere that will permit us to continue this tradition.

This year, the Section will be addressing a number of issues that affect the ability of American lawyers to interact with governments in the U.S. and around the world. For example, after years of extensive research and debate by the Section, we recently published our Blackletter Statement of Federal Administrative Law. The Statement provides an excellent overview of the current state of the principal fields in federal administrative law. As we were discussing the research papers and the Statement summary, the Section membership often identified areas of the law that warrant changes. During the next year or more, we plan to begin developing and debating resolutions to make those changes and submit them for consideration by the ABA House of Delegates. Increasing globalization has affected many areas of the law, including our Section. Over the last few months, we have been planning a project to develop blackletter statements for administrative law outside the U.S., starting with the European Union. Our current plans for this project, which the Section will undertake in collaboration with the International Law and Business Law Sections, are to follow the format for our Blackletter Statement of Federal Administrative Law and address such
This issue of the News marks the first time in a dozen years that Bill Funk is not listed as editor-in-chief. Bill’s promotion to the office of section vice chair (chair elect now that Tom Morgan has stepped down on doctor’s advice) reflects his success as editor of this publication and prompts this change at the helm.

Bill has graciously agreed to continue covering the Supreme Court, and Michael Asimow will still report administrative developments in the states.

New to the News are Yvette Barksdale, who will keep us all up to date on articles of interest, and Bill Jordan, who will cover federal courts of appeals.

Comprising the new editorial advisory board are board chair Jack Young, Cynthia Drew, Phil Harter, and Eleanor Kinney.

Together, we are committed to bringing our readers timely reporting of the events and trends shaping administrative law, provocative essays advocating or heralding change, and, of course, news of the Section’s actions and activities. Two items in this issue touch all of these bases.

Jeff Lubbers’ fine piece on the administrative law shortcomings of proposed Homeland Security legislation, excerpted from his testimony before the House, foreshadows the 2002 Administrative Law Conference panel on the government’s response to 9/11.

Sid Shapiro’s welcome contribution to Council Capsules summarizes the effort he and others have made to improve the veterans claim process, in part through a series of section sponsored programs over the past couple of years.

We invite you to drop us a line at wmatc@erols.com if you see something truly superlative – either in its brilliance or its vapidity – in this or future issues. We may not publish your comments, but you will have our attention.

We also invite you to browse the section bookstore at the back of the issue to see if there is something missing from your shelf.

In closing, we hope you find this publication informative, stimulating and enjoyable. If that is the case, then we will have done our job.

Bill Morrow
Editor-in-Chief
Creating the New Department of Homeland Security: Don’t Forget About Administrative Law!

Jeffrey S. Lubbers*

I n an attempt to meet the symbolic goal of September 11, 2002, Congress moved with unusual speed to craft the complicated legislation for creating a new Department of Homeland Security (DHS). The House of Representatives’ version of the bill, H.R. 5005, was introduced on June 24 and passed a month later on July 26. The Senate’s 447-page-version, S. 2452, approved by the Governmental Affairs Committee on July 25, has been held up due to concerns raised about two significant differences between the two bills. The first concerned provisions in HR 5005 that would remove certain civil service protections from workers transferred to the new Department in the name of managerial flexibility. The second concerns S. 2452’s assignment of more significant responsibility for analyzing law enforcement intelligence (including unevaluated intelligence) to the DHS. However, some details of special interest to administrative lawyers received insufficient attention in the bills as introduced. The following comments were directed to the House bill, although the Senate bill has since addressed some of the concerns mentioned.

The proposed Act would effect a massive reorganization, placing under one roof numerous agencies, offices, and programs or parts thereof including the Customs Service, INS, FEMA, Secret Service, Animal Plant Health Inspection Service (APHIS), Coast Guard, the new Transportation Security Agency (TSA). Some of the agencies to be transferred obviously have some functions that are unrelated to homeland security, and the Congress needs to think about ways for the DHS to spin off or send these functions back to the transferring agencies when appropriate.

The House bill contains very few procedural provisions. The bill gives the Secretary the power to promulgate regulations. It includes a broad exemption from the Freedom of Information Act and the Federal Advisory Committee Act. Finally, the bill provides that completed administrative actions of a transferred agency shall not be affected, and that pending proceedings in an agency shall continue to the same extent that they would have if transfer had not occurred.

Each of the major administrative agencies that are to be transferred to the DHS has its own special organizational rules, and rules of practice and procedure. Some of these are formal and are codified in the CFR; others are memorialized in agency memoranda and guidance documents. Extracting these and redoing them under the auspices of the DHS will be a big job. Moreover, this will not just be a paperwork exercise. For example the Coast Guard, now a part of the U.S. Department of Transportation, issues rules and decides enforcement adjudications (both formal and informal). The dockets for these actions are maintained by DOT’s central computerized docket system—one of the most advanced in the federal government. Although the Coast Guard is supposed to be transferred intact to the DHS, what will happen to its dockets? Will these electronic files have to be extracted somehow from the DOT docket system? Or will DHS ask DOT to continue to maintain these dockets?

This is symptomatic of the challenges involved in extracting sub-agencies from larger agencies, since many of them have shared functions with their parent departments. Some currently have responsibilities based not only on statute, but on Secretarial delegations—that could perhaps have been delegated elsewhere in their department. Will those delegations remain in effect after the transfer? Are they “frozen” at that point? Or can such delegations be revoked, either before or after transfer?

The agencies to be transferred also have many different types of adjudicative responsibilities. The Coast Guard and APHIS conduct formal on-the-record adjudications, and thus have the need for ALJs and formal rules of practice. The TSA has authority to assess civil money penalties, as does the Customs Service, which has a large number of adjudications, but none that require ALJs. The INS employs about 300 asylum officers—non-ALJ adjudicators—along with an Administrative Appeals Unit for some cases. And INS’ related but independent unit in the Department of Justice—the Executive Office of Immigration Review (EOIR)—employs 220 so-called “immigration judges,” three ALJs for certain types of cases, and a 23-member...
Board of Immigration Appeals. Whether and to what extent, these adjudicatory programs should be combined will require careful decisions about staffing and procedures. Moreover, the House bill seems to intend that all of these immigration-related adjudicators be transferred to DHS. This issue is of special concern because the EOIR was established in 1983 as a means of creating a nationwide system of “immigration courts” and an appeals structure that is independent of the INS.

With respect to rulemaking, the bill simply provides that the Secretary has the power to “promulgate regulations hereunder.” This means that the APA’s notice-and-comment procedures (including of course the exemption for matters relating to military and foreign affairs) would apply to DHS rulemaking, absent other statutory requirements. However, the agencies to be transferred all have their own statutory or administrative requirements for rulemaking that will have to be integrated. For example, the TSA’s statute contains a number of specific and unusual rulemaking provisions. The Coast Guard has regulations setting forth that agency’s policies and procedures regarding rulemaking. The parent departments of these agencies (DOT, USDA, DOJ and Treasury) all have their own ways of clearing regulations internally, and with the Office of Federal Register and with OMB.

Merging these processes will also require careful planning. Given the complexity of the rulemaking process, with the many applicable statutory and Executive Order requirements, a central regulatory oversight office, within the Office of the Secretary, would be beneficial. A good model is the office within the Office of the Secretary of the Department of Transportation, which serves as the clearance and oversight point, as well as a source of expert guidance, for all regulations issued by the various modal units within DOT (including the TSA and Coast Guard).

The legislation provides for a General Counsel to be the chief legal officer of the Department, though, curiously, the House bill does not provide for Senate confirmation, as is currently the case for all other Departmental GCs. Organizing this office will pose special challenges, due to its central importance in advising the Secretary, and in view of the need to integrate the various offices of general counsel (OGCs) within the agencies to be transferred.

The bill’s definition of “Executive agency” raises a few problems. It would seem to include the General Accounting Office and exclude the U.S. Postal Service—a curious omission in light of the anthrax scare. It thus may be preferable to use the more familiar broad definition of “agency” in the Freedom of Information Act.

With respect to the FOIA, the bill contains a broad exemption for information provided voluntarily to the DHS by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism. This seems too broad, especially since the FOIA itself contains exemptions for national security and law enforcement. But a floor amendment to remove this provision was defeated in the House. The wording at least should be changed to “to the extent that it relates to infrastructure vulnerabilities...” This would accord with the usual FOIA principle that exempt material be segregated, to the extent feasible, from non-exempt, releasable material.

Another section exempts DHS advisory committees from the provisions of the Federal Advisory Committee Act (FACA) so long as their establishment, purpose, and membership is announced in the Federal Register. This may raise questions about such committees already chartered under FACA by the transferred agencies. Would such committees receive an immediate exemption from FACA at the time of charter? Or would they continue to have to operate under FACA because they were not established by “the Secretary.”

**Suggestion: A Transition Task Force**

Given all of the administrative, procedural, strategic, and technical issues that will inevitably arise during such a major consolidation, I proposed that the bill provide for the creation of an interagency Transition Task Force, made up of designees of the departments that will be transferring agencies to the DHS. I was pleased to see that such a provision was included in the House bill.

There is still time to work out these difficult administrative law questions. The objective is to have a DHS that works well to protect all of us. To close with an analogy: extracting and moving these agencies is somewhat similar to a kidney transplant. The recipient will be much stronger if the operation goes well, but the surgeons must take great pains not to harm the donor, the recipient, or the organ itself.

October ABA Connection: What Every Lawyer Needs to Know About Election Law.

On October 16, 2002 at 1:00 p.m. Eastern, the ABA Connection is presenting a one-hour CLE teleconference titled, "What Every Lawyer Needs to Know About Election Law." The program is a no-cost benefit of ABA membership and is sponsored by the ABA Journal, Membership and Marketing and the Center for CLE. Continuing Legal Education credit has been applied for in states that accept the teleconference format. To register, call the ABA at 1-800/285-2221 from 8:30 a.m. to 6:30 p.m. Eastern, weekdays, beginning Wednesday, Monday September 23rd or register online by Friday, October 11th at www.abanet.org/CLE/connection.html. If you are unable to participate in the live teleconference, the program is available, at no cost, for one month, on the ABA CLE Web Site at http://www.abanet.org/cle/connection.html. Tapes of the program are also available to ABA members for $50.00 two weeks after the program. To order a tape, call the ABA Service Center at 1-800-285-2221.
Mid Year Vice Chair Nomination &
Nominations For Next Year

The Section is sad to announce that Chair-Elect Tom Morgan has been forced to resign because of health reasons. Hospitalized during the Annual Meeting, Tom’s doctors have told him he must shed some of his many responsibilities. Unfortunately, leadership of the Section is one of those.

According to the bylaws, Vice Chair Bill Funk automatically accedes to the Chair-Elect position, leaving the Vice Chair position empty. Again according to the by-laws, when the Vice Chair position becomes vacant before the Midyear Meeting, the Council selects a new Vice Chair to serve the remainder of the year and then move on automatically to Chair-Elect. Because of the importance of the position, the Section leadership is planning to have the Council select the new Vice Chair at the Midyear Meeting in February, after considering the recommendation of the Nominating Committee.

The Nominating Committee, in addition to recommending a new interim Vice Chair for consideration in February, will also over the months ahead be considering nominations for the positions of Vice Chair, Delegate, Secretary, Budget Officer, and four Council Members for election at the Annual Meeting in August 2003. The Nominating Committee is comprised of Chair Levin (LEVIN@wulaw.wustl.edu), Russ Frisby (rfrisby@comptel.org), and Katy Kunzer (Kathleen_Kunzer@americanchemistry.com). Members of the Section with an interest in any of these positions or who would like to suggest another member for consideration should communicate with one or more members of the Nominating Committee. Historically, the Section has tried to rotate the Chair position between persons from the D.C. area and persons outside the beltway, although this is not an inflexible requirement. Since Chair-Elect Bill Funk is from Oregon, tradition would suggest the interim Vice Chair would be from the D.C. area and the Vice Chair for election in August 2003 would be from outside the D.C. area.

Member News

Effective July 29th, Judge John Holmes moved to the Department of the Interior to become Chief Administrative Law Judge. Major General (Ret.) Walter Huffman, who has been responsible for regulatory policy and management at the Department of Veterans Affairs since retiring as Judge Advocate General of the Army in July 2001, has been selected to be Dean of the Texas Tech School of Law. Professor David Markell has left Albany Law School for Florida State University College of Law, where he will be the Steven M. Goldstein Professor.

News that you would like to share with the section should be emailed to William S. Morrow, Jr., at wmata@erols.com and must be received not later than December 6, 2002.

2002 Administrative Law Conference

The Section’s 2002 Administrative Law Conference (Conférence), will take place from October 17 through 19, 2002, at the Ritz-Carlton, Washington, D.C. This year’s Conference promises to be an interesting and informative mix of programs and events.

As many of you know, the theme for this year’s Conference is international administrative law. Several programs and speakers are planned to address this growing topic. There will be an all-day program examining the role of international ombuds. There will also be two programs on globalization and regulatory transparency; the first focusing on a recent agreement between the United States and the European Union that ensures each party will have access to proposed rules and analytical documents of the other and the second discussing the current extent of regulatory transparency in international standard-setting and dispute resolution organizations. The Section will also present a program, co-sponsored by the Section of Individual Rights and Responsibilities, that will consider a series of issues arising out of the United States Government’s response to the terrorist attacks of September 11.

In addition to these exciting programs, there is a whole slate of programs addressing current issues in U.S. administrative law. These programs include the Fourth Annual Regulatory Update and Forecast for Labor and Employment Lawyers, an extremely topical and timely session looking at the SEC’s role in investigating securities fraud, and a program at which John Graham and other experts will discuss the impact of the Data Quality Act on public health and environmental agencies. And, of course, it wouldn’t be the Administrative Law Conference without the ever popular Update on Annual Developments in Administrative Law.

Mark your calendars now to ensure you don’t miss what may well be the best Conference yet!!! Look for the agenda in this issue of the News. Conference details and registration materials also are available on the Section website at www.abanet.org/adminlaw/calendar.
Supreme Court News

by William Funk*

If the near end-of-term decisions of the Supreme Court were characterized by a flurry of opinions applying the Chevron doctrine, see Supreme Court News, 27 ADMINISTRATIVE & REGULATORY LAW NEWS, No. 4, Summer 2002, the last ten days of the term were notable for cases in which the Chevron doctrine was conspicuous for its lack of application.

Court Upholds Census Bureau’s Use of Imputation Rather than Actual Counting for Apportionment Census

With each decennial census much rides on the computation of the population of the various states, perhaps most importantly the apportionment of the seats in the House of Representatives. In the 2000 census, as it has in the past, the Census Bureau imputed data for certain addresses for which it could not obtain better data despite repeated attempts. That is, when normal letter and door-to-door surveys failed to obtain consistent data for particular addresses, the Bureau imputed data for those addresses based upon data from nearby addresses. Overall, such imputation resulted in an increase of 1.2 million people from what would have been the count had no such imputation been made and the population at the questionable addresses been counted as zero. While this increase was less than 0.4% of the total population, the increase was not uniform across the nation. For example, Utah’s increase was only 0.2%, with the result that in light of other states’ greater increase, Utah would lose one congressional seat compared to a count with no imputation. In Utah v. Evans, 122 S. Ct. 2191 (2002), Utah challenged the Census Bureau’s use of imputation as violative of both the census statute and the Constitution.

The initial hurdle was standing, specifically the requirement that a favorable court decision will redress or prevent the injury caused by the allegedly unlawful action. Under the apportionment procedure, the Secretary of Commerce sends a report containing the results of the census to the President; the President then sends a report to Congress specifying the population of each state and the number of representatives to which each state is entitled; and then the Clerk of the House informs each state of the number of representatives to which it is entitled. The Court in Franklin v. Massachusetts, 505 U.S. 788 (1992), involving the 1990 census, explained that this procedure allowed both the President and the House to exercise discretion in their roles; they were not required merely to accept and use ministerially the report from Commerce. This means that an injunction to the Secretary of Commerce to change his report would not necessarily result in redressing the injury complained of by the state losing representation, because the President and the House need not adjust the figures in light of the new report. Nevertheless, in Franklin four justices had specifically addressed this issue and concluded that because it was “substantially likely” that the President and the House would make changes to increase accuracy, this satisfied the redressability requirement of standing. Moreover, four other justices in Franklin, without specifically addressing the redressability issue, concluded that plaintiffs had satisfied standing requirements. Consequently, the Court in Utah v. Evans held that, because Franklin’s posture was indistinguishable from this case and because it was substantially likely that a favorable decision would in fact result in redress for Utah, Utah had standing. Justice Scalia dissented from this conclusion as he had in Franklin. He would not find redressability when the necessary action to redress the injury depends on the independent action of a third party not before the court.

On the merits, the first question was whether the use of imputation violated the prohibition in the Census Act against the use of “the statistical method known as ‘sampling’” with respect to apportionment. One might have thought that the agency’s long and consistent interpretation as reflected in several decennial censuses might have been relevant to this determination. Justice Breyer, writing for the Court, however, devoted over 2000 words to an analysis of the statutory provision, all pointing against Utah’s challenge, primarily because in statistics the use of sampling and of imputation are two entirely different techniques. Only then did he “note one further legal hurdle that Utah has failed to overcome—the Bureau’s own interpretation of the statute,” which was long and consistent and which Congress had not overruled despite amendments to the provision subsequent to the agency’s use of imputation. He concluded by stating that “[a]lthough we do not rely on it here, under these circumstances we would grant legal deference to the Bureau’s own legal conclusion were that deference to make the difference. [citing Chevron].”

Justice O’Connor disagreed with the majority’s statutory interpretation, reading the prohibition on sampling to bar imputation. She overcame the Chevron issue in

continued on page 17
Seventh Circuit holds EPA Clean Air Act compliance order is not final agency action.

Pursuant to statutory authority, EPA frequently issues administrative orders in an effort to achieve compliance with environmental statutes. More than a mere threatening letter, but less than the imposition of a penalty, an order may be enforced through injunctive relief or through the imposition of “a civil penalty of not more than $25,000 per day for each violation” of the order. 42 U.S.C. § 7413(b)(2).

EPA issued such an order to one Patrick Acker, who was responsible for asbestos removal at Pewaukee High School in Wisconsin. Reciting several violations of applicable federal asbestos regulations, the order directed Acker to comply with the applicable regulations before continuing the project in question. When Acker challenged the order, the Seventh Circuit held that such administrative orders are not “final action of the administrator” for the purpose of review under 42 U.S.C. § 7607(b)(1).

Acker v. EPA, 290 F.3d 892 (7th Cir. 2002).

Citing Bennett v. Spear, the court described the threshold requirements for finality: “(i) the action marks the consummation of the decision-making process—it must not be of a merely tentative or interlocutory nature, and (ii) the action determines a party’s rights or obligations, or is otherwise of legal consequence.” According to the court, the order could “hardly be said to mark the consummation of anything” because it referred only to the “possibility” of enforcement in the event of some future noncompliance. In the court’s view, the order did no more than “alert Acker to the potential for legal consequences” if he violated his existing duties under the Clean Air Act. In the absence of any penalty or other immediate sanction, the order was not final because it had no “practical legal effect.”

This decision would seem to reduce administrative orders to the status of threatening letters. They would have no consequence other than informing the recipient of the possibility of future enforcement action by EPA. This result would be inconsistent with the specific statutory authorization to issue such orders. EPA needed no statutory authority to issue threatening letters, so this administrative order must have a higher status than that recognized by the court. Indeed, the Clean Air Act creates such a higher status by providing that EPA may seek a civil penalty for violation of the “order” itself, not merely for violation of the underlying regulations. 42 U.S.C. § 1713(b)(2). Thus, in the language of Bennett v. Spear, the order has “alter[ed] the legal regime” governing Acker’s conduct. The order represents the consummation of EPA’s decision-making about Acker’s activities, and it determined Acker’s rights by creating distinctly separate enforceable requirements. Nonetheless, in the Seventh Circuit the order does not constitute final agency action. The Circuits seem to be split on this issue. See Alaska, Dept. of Environmental Conservation v. U.S. E.P.A., 244 F.3d 748 (9th Cir. 2001) (final order); Solar Turbines Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989) (not final order); Asbestec Const. Services, Inc. v. U.S. E.P.A., 849 F.2d 765 (2d Cir. 1988) (not final order); Allsteel, Inc. v. U.S. E.P.A., 25 F.3d 312 (6th Cir. 1994) (final order).

D.C. Circuit Upholds FAA Interpretive Rule Issued Without Notice and Comment

The Summer issue of the News, see News from the Circuits, 27 ADMINISTRATIVE & REGULATORY LAW NEWS, No. 4, Summer 2002, reported on General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002), in which the D.C. Circuit had held that EPA had violated the Administrative Procedure Act by issuing a guidance document without notice and comment. The particular guidance document, which identified certain risk assessment methods as acceptable in seeking certain agency approvals, would be considered a “statement of policy,” rather than an interpretive rule. The Court’s decision hinged largely on the fact that the language of the document gave it “binding force . . . in standard cases.”

Shortly after General Electric, the D.C. Circuit upheld a guidance document that constituted an interpretive rule exempt from the notice and comment requirements of the APA. The contrast between these decisions is instructive.

The policy statement of General Electric succumbed because the court viewed it as stating a new requirement in mandatory terms. In Air Transport Association of America, Inc. v. FAA, 291 F.3d 49 (D.C. Cir. 2002), however, the mandatory nature of the guidance document’s interpretive statement had no bearing
on its validity. Although the court did not discuss the point, it is important to understand that by its very nature an interpretation will frequently be stated in mandatory terms. Thus, when evaluating a guidance document, it is essential first to determine whether it should be characterized as a statement of policy or an interpretative statement.

*Air Transport* involved review of a letter in which an FAA Deputy Counsel stated the agency’s interpretation of an agency regulation governing the rest periods required for commercial pilots. Responding to a challenge by the airline industry, the court first upheld the FAA’s interpretation on the merits under the highly deferential standard (“plainly erroneous or inconsistent with the regulation”) applicable to an agency’s interpretation of its own regulation.

The court then addressed the airlines’ argument that the FAA had violated the APA by issuing the interpretation without notice and comment. First, the court rejected the argument that the letter was a “substantive rule,” rather than an interpretive rule exempt from notice and comment. Finding that the FAA had “reasonably interpreted” its regulation, the court concluded that the interpretation was “fairly encompassed” within the existing regulation. The existing regulation itself would be an adequate basis for enforcement of the position, so the letter did not impose any “new rights or duties.” It is difficult to tell how this ruling is distinct from the court’s earlier ruling upholding the agency’s interpretation on the merits. One is tempted to read *Air Transport* as equating an interpretation’s survival on the merits with its qualifying as an interpretive rule. On other facts, however, an agency’s interpretation might well survive highly deferential merits review but not be sufficiently reasonable to be “fairly encompassed within the regulation” such that the regulation itself could constitute a basis for enforcement. See, e.g., *GE v. USEPA*, 53 F.3d 1324 (D.C. Cir., 1995).

Finally, the court rejected the argument that the FAA’s interpretation was required to go through notice and comment because it was inconsistent with prior FAA interpretations and practices. Distinguishing *Alaska Professional Hunters* and *Paralyzed Veterans*, the court found that the FAA’s various prior statements and practices were either consistent with its new interpretation or were not so “definitive” as to constitute an “administrative common law” that could be changed only through notice and comment.

**D.C. Circuit - Request for Agency Reconsideration Renders Penalty Order Non-Final After 11 Years**

Be careful what you wish for. In 1991, FERC issued a notice of proposed penalty against Clifton Power Corp. in the amount of $148,000. An ALJ reduced the fine to $15,000, but the Commission raised it back to $122,100. The D.C. Circuit vacated the penalty because the Commission had failed to explain why it rejected the ALJ’s recommendation. The Commission then adopted the ALJ’s decision and recommended penalty, denied a request for rehearing, and granted a stay pending judicial review.

In February 2001, one month short of a decade from the original proposed penalty, Clifton filed a second request for reconsideration with the Commission. Shortly thereafter, with the request still pending, Clifton sought judicial review in the D.C. Circuit. Clifton lost because after all that time the agency’s decision was not final. Why not? Because a “request for administrative reconsideration renders an agency’s otherwise final action non-final with respect to the requesting party.” *Clifton Power Corp. v. FERC*, 294 F.3d 108 (D.C. Cir. 2002). The fact that the Commission soon thereafter denied the request for reconsideration did not save Clifton’s filing. Its request for reconsideration rendered its petition for review “incurably” premature.

Although the opinion does not directly address the point, it appears that Clifton did not refile its petition for review within the statutory deadline of 60 days after the agency’s denial of its request for reconsideration. At that point, both the penalty decision itself and the reconsideration decision would have qualified as final agency action and been subject to judicial review. Having filed prematurely and failed to refile, Clifton apparently lost the opportunity to seek further review of the Commission’s penalty decision. Clifton tried to avoid this result by arguing that the Federal Power Act dictated a different result. The FPA provides that the Commission may modify or set aside an order even after a petition for review has been filed, up to the date the record is filed in a court of appeals. The court rejected this argument. The fact that an agency has the authority to change its mind does not render its decision non-final. But if a party to an agency proceeding asks the agency to change its

*continued on page 19*
By Michael Asimow*

**Breaking The Code Of Silence**

It is often difficult for a plaintiff in a medical malpractice case to find a medical expert willing to testify against the defendant doctor, especially in a small rural state. The South Dakota Supreme Court's decision in *Matter of Medical License of Ruben Setliff, MD*, 645 N.W.2d 601 (2002), illustrates what can happen to a doctor who breaks the medical code of silence.

Dr. Setliff testified as an expert for the plaintiff in a malpractice case. On cross examination, he denied that his own medical privileges had formerly been "restricted" in Wyoming. This was a rather evasive answer; Dr. Setliff's ability to perform a particular type of surgery had been impeded because a hospital required patients to obtain a second opinion before Setliff could operate. But counsel had advised Dr. Setliff that this was not a "restriction" and, in any event, the matter was fully explored during cross-examination, so the jury was not misled.

The defense lawyer in the malpractice case reported Setliff to the South Dakota Medical Board. The defendant's expert in the malpractice case was on the committee that investigated this complaint. The Board then revoked Setliff's license to practice for six months! It stated that he had intentionally testified falsely as an expert witness. This constituted conduct "unbecoming a person licensed to practice medicine," one of the statutory grounds for discipline.

The Supreme Court did not take the route suggested by a famous Oregon case—that vague standards like "conduct unbecoming" need to be clarified by regulations before they can be applied in adjudication. *Megdal v. Oregon State Board of Dental Examiners*, 605 P.2d 273 (1980). Instead, it accepted that "conduct unbecoming" includes any conduct that involves unfitness to practice medicine—and false expert witness testimony could establish unfitness. And false testimony would not have to reach the level of criminal perjury before it could trigger licensing discipline.

However, the Court held the revocation in this case was an abuse of discretion, given that the appropriate standard of proof for revoking a professional license in South Dakota is "clear and convincing evidence."

Under the circumstances, the evidence against Setliff failed to show unfitness by clear and convincing evi-

dence since the testimony was evasive but arguably not false, it was clarified during further cross-examination, and he was relying on an opinion of counsel.

Reading between the lines of the opinion, one gets the impression that the justices perceived that the South Dakota doctors and malpractice defense lawyers were out to get Setliff for breaking the code of silence and the Court was protecting a brave professional who dared break that code.

**Guns on campus? Utah struggles with a “policy” that might be a “rule.”**

A longstanding published "policy" at the University of Utah prohibits students and staff from possessing any firearm on campus. This policy, which was not adopted under the APA rulemaking provisions, appears to conflict with a state statute which restricts state entities from interfering with persons who have concealed weapon permits. This conflict impacts students or staff who possess such permits and want to bring their weapons on campus. While state law would allow it, University "policy" would prohibit it. Non-permit holders face no such conflict—they cannot carry concealed weapons under other state law.

The Utah APA distinguishes a "policy" from a "rule." A policy "broadly prescribes a future course of action, guidelines, principles, or procedures." But "a policy is a rule if it conforms to the definition of a rule." It would seem that the University’s "policy" may well be a "rule" and thus invalid procedurally since it does not fit the definition of "policy" and seems to conform to the definition of a "rule."

Each year, under the Utah APA, all administrative rules become invalid unless they are "reauthorized" by the legislature. The Legislative Administrative Rules Review Committee recommends which rules should not be reauthorized. The Committee listed the above university policy for non-reauthorization and the legislature failed to reauthorize the policy. However, the effect of this legislative action is unclear since the reauthorization procedure seems to apply to "rules" rather than "policies."

Indeed, in the May 1, 2002 edition of the Utah State Bulletin, an editor's note stated that:"The Division [of Administrative Rules] has no jurisdiction over policies, and therefore will take no action regarding them."

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* Information for this article was contributed by a person in Utah who wishes to remain anonymous.
Thus the Division has refused to honor the legislative decision failing to reauthorize the policy.

The University of Utah sought a declaratory judgment in federal court seeking to uphold the right of the University to enforce its policy. Among other grounds, it claims that it enjoys academic freedom rights under the U.S. and the state constitutions, that the University was established pursuant to a federal land grant and so cannot be regulated by the state, and that another statute prohibits any person from possessing any firearm on or around school premises. It further argues that the policy is not subject to the reauthorization provisions in Utah’s APA.

It is unclear whether the federal court will consider the possible procedural invalidity of the policy as well as the various arguments relating to its substantive validity. A decision is expected within the next few months.

Removal for Cause? How about a Difference of Opinion2

A long-standing and unresolved question concerns the power of the executive to remove an agency head “for cause.” Just what do we mean by “cause,” and will a difference in opinion suffice?

In Levy v. Acting Governor, 436 Mass. 736 (2002) [Levy II], the Supreme Judicial Court of Massachusetts settled a prominent dispute arising from Acting Governor Jane Swift’s attempt to remove Jordan Levy and Christy Peter Mihos as members of the Massachusetts Turnpike Authority. The Turnpike Authority consists of two members and a Chairman appointed by the Governor. Under ch. 30, § 9 of the state APA, an officer appointed by the Governor may be removed by the Governor for cause.

The Turnpike Authority is supposed to identify new sources of funding for the “Big Dig” project. After a public hearing, Levy and Mihos voted to approve highway toll increases beginning July 1, 2002, rather than January 1, 2002, as previously proposed. After this vote delaying the date of the toll increase, the Governor began removal proceedings against Levy and Mihos. Levy and Mihos challenged the Governor’s ability to remove them.

In an earlier decision, the Supreme Judicial Court unanimously upheld the Governor’s ability to remove members of the Turnpike Authority based on ch. 30, § 9. Levy v. Acting Governor, 435 Mass. 697 (2002)[Levy I]. Subsequently, the Governor determined that Levy and Mihos should be removed for cause immediately, citing their irresponsibility with respect to the Turnpike Authority’s finances.

In a 4-3 decision, the Court ruled that the circumstances cited by the Governor amounted to a “difference of opinion between the Governor and two members of the Authority over the policy of the Authority and the ability of members to fix tolls,” and that substantial evidence warranting the removal of Levy and Mihos for cause did not exist.

The result in this case is interesting for several reasons, in addition to the public sensitivity to issues relating to financing the Big Dig. First, the majority’s conclusion that the Authority should be considered independent seems inconsistent with its conclusion in Levy I that the Turnpike Authority has “limited independent existence” and “is subject to certain supervision and control of executive branch officers.”

Second, in applying the substantial evidence standard of review, the majority distinguished the case from earlier decisions in which the court applied the more deferential arbitrary and capricious standard in cases involving removal of appointed officials. The decision’s effort to carve out a level of independence from executive branch oversight for agencies such as the Turnpike Authority seems in harmony with federal cases involving the removal of officials of independent agencies. Indeed, Levy II is reminiscent of Humphrey’s Executor v. United States, 295 U.S. 602 (1935), in which President Roosevelt sought to remove a member of the Federal Trade Commission because of political differences, ignoring the statutory provision specifying removal only for cause.

The Supreme Court invalidated the removal, establishing the viability of the independent federal agency.

Desperately Seeking Medicaid–Indiana Cracks Down On Affluent Seniors 3

Because of the prohibitive cost of nursing home care, affluent seniors (and their lawyers) commonly engage in creative planning to reduce their assets in order to qualify for Medicaid.

continued on page 21

1 The information for this article was provided by Renée M. Landers, Associate Professor of Law, Suffolk University Law School, Boston.

3 The information for this article was provided by Cynthia A. Baker, Director, Program on Law and State Government, University of Indiana, Indianapolis, School of Law. She credits journalist Kevin Corcoran whose articles in the Indianapolis Star brought this issue to her attention.
Reform of Veterans Benefits Adjudication

The council considered a recommendation sponsored by the Regulatory Initiatives and Veterans Affairs Committees that addresses ways to make agency adjudication of veterans benefit claims fairer and more efficient. After extensive discussion, the council asked the committees to revise the report and recommendation in light of the council members’ remarks and to resubmit the report and recommendation for consideration at the 2002 Administrative Law Conference this fall. The council also directed Section Chair Neil Eisner to request input on the committees’ recommendation from the Veterans Administration (VA). If approved by the council, the recommendation would be submitted to the ABA House of Delegates for adoption as ABA policy.

The problem addressed by the recommendation is the long delays in adjudicating claims. As of August 21, 2001, 668,000 benefit claims were pending at the VA. The VA estimates that it takes an average two and one-half to three years to process a claim from the time it is filed through one administrative appeal to the Board of Veterans Appeals (BVA), which makes the final benefit determination on behalf of the VA. Some claims, however, can take seven years or longer. VA must not only resolve a large number of initial claims, but also process a large number of cases that are remanded from the BVA and the U.S. Court of Appeals for Veterans Claims (CAVC), which hears appeals from BVA decisions. The BVA remands about 40 percent of the appeals it hears and the CAVC remands nearly 70 percent of the appeals it hears. As of July 2001, there were 31,730 remands pending in VA regional offices (out of 668,000 pending claims). The VA takes even longer to process remands than original claims. As of July 2001, the regional offices took an average of 184.2 days to render a decision on an initial claim and an average of 672 days to process a remand from the CAVC or the BVA.

The recommendation is based on a series of programs and debates that the section has sponsored concerning VA benefit decision making. A panel at the 2001 Midyear Meeting in San Diego examined problems in the adjudication of claims for disability compensation for posttraumatic stress disorders. Another panel at the fall 2001 Administrative Law Conference in Washington, D.C., considered whether VA disability decisions should be subject to formal APA adjudication and traditional judicial review, similar to the system used by the Social Security Administration (SSA). The 2002 Midyear Meeting in Philadelphia included a program that addressed how VA adjudication might be reformed if the current system of adjudication is retained.

Although some members of the two committees supported abolishing the current system of adjudication and replacing it with a system similar to the one used by SSA, there was no consensus to make this recommendation to the Council. Instead, the recommendation identifies a number of steps that the CAVC and Congress could take to speed up resolution of benefit claims. The recommendation proposes that the CAVC, as a matter of general practice, should hear all questions of law presented to it rather than refusing to resolve a legal claim not expressly argued before the BVA, and that it should exercise its statutory authority to expedite VA decisions when it remands a case for further administrative proceedings. The recommendation also proposes that Congress should require the CAVC, when it remands a claim for further administrative proceedings, to resolve all allegations of error presented by and briefed by the appellant that, if left unresolved, could be the subject of a subsequent dispute before VA. The recommendation would also have Congress authorize the CAVC to certify class actions and authorize the Federal Circuit, which has limited jurisdiction to review CAVC decisions, to transfer a case to the CAVC in which class relief is warranted. Finally, the recommendation proposes that Congress should require the Secretary of Veterans Affairs to choose members of the BVA from among those persons listed on the Administrative Law Judge register maintained by the Office of Personnel Management.

Section members or others who would like to comment on the proposals can contact either Sidney Shapiro (sshapiro@ku.edu) or Ron Smith (rsmith@davmail.org), who presented the proposal to the council on behalf of the sponsoring committees.

House Resolutions

The House approved a resolution sponsored by the Section of Individual Rights and Responsibilities and the Association of the Bar of the City of New York urging federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shares a mutual, interdependent, committed relationship with a victim of terrorism or other crime can qualify for crime victim compensation and assistance funds provided by that government to eligible spouses. This resolution was supported by the Administrative and Regulatory Law Section’s delegates as instructed by the council.

The House approved a resolution sponsored by the Kentucky Bar Association and the Litigation Section urging the President to promptly nominate candidates...
to fill federal judicial vacancies, the Senate Judiciary Committee to promptly clear or reject nominees, and the full Senate to promptly advise and consent or reject the nominees. Last Retiring Chair C. Boyden Gray had offered a similar resolution with a built-in timeline for action. Although Gray preferred his version because of its timeline, he was happy to see the House bring attention to the unacceptable delays in filling federal judgeships.

Scholarship Awards
Scholarship Subcommittee Co-Chair Jack Beermann presented the 2000 Scholarship Award to Jody Freeman, Professor of Law at UCLA Law School. The Section was unable to present the award to Professor Freeman when it was conferred last year due to travel constraints. Beermann reminded the council that the subcommittee had recommended Professor Freeman for her article on *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000), the latest in a series of important articles she has written on public and private cooperation in the regulatory system.

Beermann also announced the Scholarship Subcommittee’s recommendation that Harvard Law Professor Elena Kagan receive the 2001 Scholarship Award for her article on presidential attempts to control the regulatory functions of executive branch agencies titled, *Presidential Administration*, 114 Harv. L. Rev. 2246 (2001). Beermann said that many of the pieces submitted for consideration were worthy of a prize, but in its ambition, depth, and imaginativeness, Kagan’s stood above the others. Beermann predicted that the article will influence the field for years. The council approved the recommendation.

Outstanding Government Service
Council member John Cooney, co-chair of the Outstanding Government Service Subcommittee, reported the committee’s unanimous recommendation that this year’s Mary C. Lawton Award go to Alan Schoem, who has had a distinguished 29-year career with the Consumer Product Safety Commission. Cooney said that the subcommittee believes Mr. Schoem stands out because of the example he has set as a lifelong practitioner on the front lines of administrative law, his career-long dedication to public service, a record of tangible and extremely beneficial accomplishments, and his obvious enthusiasm and leadership at the CPSC.

A major factor in the subcommittee’s decision to recommend Mr. Schoem for the award is that he exemplifies the best in a career government attorney who works his way through the ranks of a major agency to assume successively more responsible, challenging, and influential positions. He began as a CPSC staff attorney with the Office of General Counsel in June 1973. In 1979, he was named Assistant General Counsel for Enforcement and Information. From 1987 to 1996, Mr. Schoem was Director of the Division of Administrative Litigation in the Office of Compliance. He was appointed to his present position as Director of the Office of Compliance in October 1997, where he continues to serve today. He also has served as a LEGIS Fellow to Senator Paul Wellstone, a legal advisor to CPSC Chairman Brown, and Executive Assistant in the Office of Compliance.

Mr. Schoem’s career demonstrates that he has been an excellent practitioner of administrative law in both the rulemaking and adjudicatory areas. Among his more recent and significant accomplishments were a $1.75 million penalty settlement case involving numerous baby products produced by two Dorel subsidiaries and an $850,000 penalty settlement against Federated Department stores for sleepwear flammability violations.

Mr. Schoem also played a major role in the institution of the “Fast Track Recall System” which promotes voluntary correction of potential hazardous products in the marketplace. In 1998, the Fast Track Recall System was named a winner of the Innovations in American Government Award of the Ford Foundation and Harvard University, in conjunction with the Council for Excellence in Government.

FDA Letter
Joel Hoffman, former chair of the Food and Drug Committee, briefed the council on the request of the Food and Drug Committee of the Business Law Section that the Admin Law Section join it in issuing a blanket authority letter to the President and the Senate recommending prompt nomination and confirmation of an FDA Commissioner. After some discussion, the consensus was Hoffman should redraft the letter to incorporate the council’s comments and circulate it for further consideration.

Membership
Myles Eastwood, chair of the Membership and Outreach Committee, reported that enrollment in the Section as of July 31, 2002, was 11,657 members.

continued on page 21
The Insiders Guide to Federal Government Hiring
9:00 – 10:00 a.m.
Co-Sponsored by the Government and Public Sector Lawyers Division
Program Chairs: John Hardin Young and Elise Hoffman

Evolution of Ombudsman Worldwide
9:00 a.m. - 12:00 p.m., 2:30 p.m. - 5:00 p.m., The Ritz Carlton Hotel
Presented by the Ombuds Committee
Program Chairs: Nancy Harter and Sharan Levine
Moderator: Sharan Levine, Levine and Levine, Kalamazoo, Michigan

NCALJ Program
9:30 a.m. – 11:30 a.m., The Ritz Carlton Hotel
Presented by the Judicial Division’s National Conference of Administrative Law Judges
Program Chair: Hon. Ruth Kleinfeld, Administrative Law Judge, Social Security Administration, Manchester, NH

Bi-Partisan Campaign Finance Reform Act
10:30 a.m. – noon, The Ritz Carlton Hotel
Presented by the Elections Committee
Program Chair: Trevor Potter, Partner, Caplin & Drysdale, Washington, DC
Moderator: Ronald Levin, Henry Hitchcock Professor of Law, Washington University School of Law
Speakers:
• Thomas Mann, W. Averell Harriman Chair and Senior Fellow in Governmental Studies, The Brookings Institution, Washington, DC
• Trevor Potter, Partner, Caplin & Drysdale, Washington, D.C.
• Don Simon, Partner, Sonosky, Chambers, Sachse, Endreson & Perry, Washington, DC
• Joe Sandler, Partner, Sandler, Reiff and Young, Washington, DC
• Don McGahn, General Counsel, National Republican Congressional Committee, Washington, DC
• Cleta Mitchell, Partner, Foley & Lardner, Washington, DC
This panel will analyze the issues in the current litigation over the Bipartisan Campaign Reform Act of 2002. Panelists, who include lawyers on both sides of the litigation, will discuss the constitutional and administrative law issues at stake. Attention will also be paid to the FEC rulemaking process, which has been the subject of controversy.

Globalization, Regulatory Transparency, and the European Community
10:30 a.m. – noon, The Ritz Carlton
Presented by the Regulatory Initiatives and Rulemaking Committees.
Program Chair and Moderator: Sidney A. Shapiro, Rounds Professor of Law, University of Kansas, Lawrence, KS
Speakers:
• Andreas P. Reindl, Skadden, Arps, Slate, Meagher & Flom, Washington, DC
• Charles Koch, Dudley W. Woodbridge Professor of Law, Marshall-Wythe School of Law, College of William and Mary, Williamsburg, VA
• Raymond J. Friel, Professor of Law and School Head, University of Limerick (Ireland)
• Rod Hunter, Counselor to the General Counsel, USTR, Washington, DC
This program will discuss the current extent of regulatory transparency in the European Community and to the extent to which the EU should adopt rulemaking procedures similar to those used in the US to promote public participation, as the TABD proposes.
Scorecard Program
10:30 a.m.- noon, The Ritz Carlton
Presented by the Rulemaking Committee
Program Chair: Daniel Cohen, Chief Counsel for Regulation, U.S. Department of Commerce, Washington, DC

Food & Drug/HHHS program
10:30 a.m. – 12:30 p.m., The Ritz Carlton
Presented by the Food & Drug and Health and Human Services Committees.
Program Chair: Scott Bass, Partner, Sidley & Austin, Washington, DC

Ethics for Environmental Practitioners
12:30 p.m. – 2:30 p.m. The Ritz Carlton
Presented by the Environment and Natural Resources Committee
Program Chairs and Moderators: Blake A. Biles, Arnold & Porter, Washington, DC, Cynthia A. Drew, University of Miami, Coral Gables, FL

Securities, Commodities and Exchanges Committee Meeting
12:30 p.m. – 2:00 p.m, The Ritz Carlton

Fifth Annual Update for Labor Lawyers
1:00 – 2:30 p.m. The Ritz Carlton
Presented by the Labor and Employment Law Committee
Program Chair and Moderator: Nancy Shallow, William M. Mercer, Inc., Detroit, MI
Panelists will highlight significant recent regulatory developments affecting labor and employment issues and will discuss the anticipated focus and direction of the Department of Labor, EEOC, and other agencies. A question and answer session will follow.

Globalization, Regulatory Transparency, and International Trade Agreements
1:00 p.m. – 2:30 p.m., The Ritz Carlton
Presented by the Regulatory Initiatives and Rulemaking Committees.
Program Chair and Moderator: Sidney A. Shapiro, Rounds Professor of Law, University of Kansas, Lawrence, KS
Speakers:
- Lori Wallach, Director, Public Citizen Global Trade Watch, Washington, DC
- Alfred Amen, Roscoe C. O’Byrne Professor of Law, University of Indiana, Bloomington, In
- Mary Saunders, Director, Global Standards Program, National Institute of Standards and Technology, Washington, DC

- David Newman, Attorney-Advisor, Office of the Legal Advisor, Department of State, Washington, DC

This program will discuss the current extent of regulatory transparency in international standard-setting and dispute resolution organizations and the extent to which such organizations should adopt procedures that would make them more transparent to the public.

Role of Inspector General at HUD
1:00 p.m. – 3:00 p.m., The Ritz Carlton
Presented by the Housing and Urban Development Committee
Program Chair: Otto Hetzel, Professor, Wayne State University of Law, Washington, DC

This program is directed towards assessing the role, current focus, and work products of HUD’s Office of Inspector General. The program is intended to address how HUD’s Inspector General’s Office has been looking at its role and functions, what are the appropriate interfaces between legal counsel for grant fund recipients and contractors and the Inspector General’s auditors, and as reflected in its work product, how has the Inspector General seen its role and focused its efforts. An inherent question to be addressed will be what is the appropriate role for an Inspector General and what functions should it perform and what priorities should it undertake.

Criminal Process Program
1:30 p.m. - 3:00 p.m., The Ritz Carlton
Presented by the Criminal Process Committee
Program Chair: David Douglass, Partner, Porter, Wright, Morris & Arthur, Washington, DC

Learning to Live with the Data Quality Act: What the Public Health and Environmental Agencies are Doing and What They Could Do Better
3:00 p.m. - 4:45 p.m., The Ritz Carlton
Presented by the Environment and Natural Resources Regulation Committee in cooperation with the Rulemaking; Regulatory Policy; and Government Information and Right to Privacy Committees and by the ABA Science and Technology Section (Invited)
Program Chair and Moderator: Wendy Wagner, Joe A. Worsham Centennial Professor of Law, University of Texas School of Law, Austin, TX
Speakers:
- Dr. John Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC
- Fred Anderson, Cadwalader, Wickersham and Taft, Washington, DC
- Sid Shapiro, Rounds Professor of Law, University of Kansas and The Center for Progressive Regulation, Lawrence, KS
The Section’s fall meeting marks the point at which the agencies’ data quality guidelines become fully operational. To celebrate this historic moment in administrative law, a panel of experts on the Data Quality Act will offer their views of the Act, the OMB guidelines, and most significantly, discuss the immediate future of the Act’s implementation in view of the recently finalized agency guidelines.

Section Dinner and Reception
7:00 p.m. – 9:30 p.m.

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Friday October 18, 2002

**Annual Developments in Administrative Law**
9:00 a.m. – noon, The Ritz Carlton
Program Chair and Moderator: Jeffrey Lubbers, American University Washington College of Law, Washington, DC

**Speakers:**
- **Michael Asimov**, Professor of Law, UCLA Law School, Los Angeles, CA
- **Jack Beermann**, Professor of Law, Boston Univ. School of Law, Boston, MA
- **Bernard Bell**, Professor, Rutgers Law School, Newark, NJ
- **Michael Herz**, Professor of Law, New York Univ. School of Law, NY, NY
- **Mark Seidenfeld**, Professor, Florida State University College of Law, Tallahassee, FL

This program will provide a roundup of the most important administrative law events of the past twelve months. Speakers representing several of the Section’s administrative process committees will summarize the latest developments in their respective fields of expertise. Adapted versions of theses presentations will be published – along with other committee reports – in the Section’s fifth Annual Survey of Developments in Administrative Law. This is a must attend program for anyone practicing in Washington regardless of field of law.

**Awards Luncheon**
12:30 p.m. – 2:00 p.m., The Ritz Carlton

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Saturday October 19, 2002

**Council Meeting**
9 a.m. – 12:00 p.m., The Ritz Carlton

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National Security and Civil Liberties One Year Later
2:30 p.m. – 4:45 p.m.
Co-Sponsored by the Section of Individual Rights and Responsibilities
Program Chair and Moderator: Lynne Zusman, Lynne K. Zusman and Associates

**Speakers:**
- **John Payton, Esq.**, Partner, Wilmer, Cutler & Pickering, Washington, DC
- **Whit Cobb**, Deputy General Counsel (Legal Counsel), Department of Defense, Washington, DC
- **Hannah Sistare**, Executive Director, National Commission on the Public Service, Washington, DC
- **Thomas Crocker, Esq.**, Partner, Alston & Bird, LLP, Washington, DC
- **Michael Greenberger**, Director, Center for Health and Homeland Security, Baltimore, MD
- **David Cole**, Professor of Law, Georgetown University Law Center, Washington, DC
- **Morton Halperin**, Director, Washington Office, Open Society Institute, Washington, DC
- **John Cooke**, Chair, ABA Standing Committee on Armed Forces Law; Brigadier General (ret.), Washington, DC


**Section Reception**
5:00 p.m. – 7:00 p.m.

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Chair's Message continued from page 2

subjects as how the European Union process for issuing regulations or releasing information to the public compares to ours. Through this document, we hope to make clear to Americans how they can effectively participate in the European process. As part of this effort, at our fall 2002 Administrative Law Conference in Washington, D.C., we will have three programs involving international administrative law issues; two will involve issues of harmonization and the need for transparency in the process and one will involve the use of ombuds. The latter program relates to a Section-sponsored resolution adopted by the ABA House of Delegates in August 2001, which set standards for the establishment and operation of ombuds offices.

These are just some of the things that we will be doing during the next year. There are a lot of people working very hard to make it a very successful year, and I am sure that their work will make it a rewarding year for all of us. But to ensure our success, we need to hear from our membership. We have tried to make this as easy as possible, especially through our internet site, http://www.abanet.org/adminlaw/home.html, where you can register for listserves and take advantage of a number of other resources. Send us your feedback on what we have done as well as your ideas on what we should be doing. You may communicate through your committee leaders or contact me or other leaders of the Section directly. Our leadership directory is available at the internet site, as well as on the inside back cover of this magazine.

Supreme Court News continued from page 7

two ways. First, she stated that it was not shown where the Bureau had rendered an interpretation “with the force of law,” citing Christensen v. Harris County, 529 U.S. 576 (2000), for the proposition that Chevron deference only applies in such circumstances. Second, she maintained that the Bureau’s interpretation raised “a difficult constitutional question,” which under normal canons of statutory construction should be avoided, thus trumping Chevron.

The second question on the merits was whether the Constitution’s requirement for an “actual enumeration” prohibited the use of imputation. The Court held that “actual enumeration” did not impose a rigid requirement to count every person in the flesh and that imputation as used by the Census Bureau was simply circumstantial evidence of actual persons not necessarily less reliable than the oral or written responses of third persons in letter and door-to-door surveys. The “actual enumeration” requirement rather is only a bar to general estimates of population, the method upon which the initial apportionment was made, and which the Founding Fathers did not want repeated. This conclusion was rejected by Justices Thomas and Kennedy, who read the constitutional provision as mandating the counting of whole persons and prohibiting estimation of any kind. Accuracy, they said, is not the touchstone to the census; insulation from political manipulation is, and when estimation is allowed, there is necessarily room for manipulation.

Court Holds That NLRA Does Not Permit NLRB to Punish a Reasonably Based But Unsuccessful Lawsuit Filed with a Motive to Interfere with Lawful Union Activity, But It May Imply More

In BE & K Construction Co. v. NLRB, 122 S. Ct. 2390 (2002), a non-union contractor filed a series of lawsuits against a union which had engaged in various lawful actions designed to impede one of the contractor’s construction projects. All of the lawsuits were decided at summary judgment against the contractor or were voluntarily dismissed. The trial court had imposed Rule 11 sanctions, but the court of appeals reversed, finding the contractor’s position not frivolous. Thereafter, the National Labor Relations Board filed a complaint against the contractor, alleging that the contractor had violated the National Labor Relations Act by interfering with employees’ exercise of rights related to self-organization through instituting the various lawsuits. The Board held against the contractor, finding that the suits were without merit, in light of their outcome, and that they had been filed to retaliate against the union. The issue before the Court was whether such findings would suffice to make out a violation of the NLRA.

The Court concluded that they did not.

Again, such an interpretive question answered by an agency in a formal adjudication might be thought to merit Chevron deference if the statute were ambiguous, but neither Chevron nor any issue of deference were mentioned in any of the three opinions in the case. Rather the Court focused on First Amendment limitations affecting the scope of the Act. Although the Court did not articulate a reason why this would make
Chevron analysis inappropriate, there are at least two separate ways to reach such a conclusion. First, it is generally agreed that Chevron's second step can be avoided if a statute’s ambiguity can be eliminated by application of a canon of construction. Here, it could be said that the Court merely interpreted the statute to avoid constitutional questions raised by the First Amendment, eliminating in the circumstances of this case any ambiguity that might merit Chevron deference to the agency. A second way of reaching the same conclusion is to say that Chevron deference only runs to the agency’s interpretation of the statute itself, not to how constitutional provisions may affect the application of the statute.

In any case, the Court, after reviewing its precedents in both labor law and antitrust law, determined that in light of First Amendment concerns the NLRA did not authorize actions that would effectively punish a person for filing a lawsuit, even though motivated by retaliatory purposes, merely because the lawsuit was ultimately unsuccessful. This conclusion contained in Justice O'Connor’s opinion for the Court was unanimous. Consistent with Justice O'Connor’s philosophy of only deciding cases on the most narrow of bases, her opinion expressly did not decide when, if ever, the NLRA would authorize action against retaliatory lawsuits. Justices Scalia, joined by Justice Thomas, concurred in the Court’s opinion but wrote separately to indicate his belief that the opinion implied that the NLRA would authorize such action only in the same circumstances as allowed under the Sherman Act: when the “lawsuits are both objectively baseless and subjectively intended to abuse process.” Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, concurred in the Court’s limited conclusion, but wrote separately to attack the implication found by Justice Scalia. In his view, the Court had left open “other circumstances in which the evidence of ‘retaliation’ or antitrust motive might be stronger or different.” In addition, he indicated that the Court had not addressed at all “lawsuits the employer brings as part of a broader course of conduct aimed at harming the unions and interfering with employees’ exercise of their rights.”

**Court Upholds IRS Assessment of Restaurant Employers’ FICA Tax Liability Based Upon an Aggregate Estimate of their Employees’ Tips**

It is sometimes suggested that general administrative law principles do not apply to the IRS. Other was suggest that general legal principles do not apply to the IRS. The case of United States v. Fior d’Italia, Inc., 122 S. Ct. 2117 (2000), might support the former view, if not the latter. The Federal Insurance Contribution Act (better known as FICA) levies taxes on both employers and employees to pay for Social Security. The employer’s contribution is a percentage of the employee’s wages. In 1987 Congress amended the Internal Revenue Code to provide that tips received by employees are considered part of their wages. Employees are required by the Code to report their tips to their employer, and the Code then requires employers to pay FICA taxes based upon those reports. Everyone recognizes, however, that these reports understate to a substantial degree the actual amount of tips received. The IRS for practical and political reasons is reluctant to pursue waiters and waitresses for underreporting their tips, so it has focused its activities on the employer. Under the Code the IRS may give notice and make demand from employers for their FICA percentage of the unreported tips. In other words, the IRS is obtaining the employers’ FICA contribution but not the employees’ contribution from the unreported tips. A half a loaf is better than none. The question then is how to determine the amount of the employees’ unreported tips. The IRS uses what it calls an “aggregate estimate.” The aggregate estimate looks to all the tips reflected on the employer’s credit card receipts. To this figure the IRS adds the same percentage from the cash receipts as the tips reflected in the credit card receipts. This would then be the total tips received by all employees. Because the employer has already paid the FICA tax on the reported tips, the amount of the reported tips is deducted from the total tips, and the employer’s new FICA liability is based upon the remaining total. Fior d’Italia, a restaurant that had been subject to this process, challenged this aggregate estimate as beyond the IRS’s statutory authority. Its reading of the Code would require the IRS to determine each employee’s unreported tip amount and then assess the employer on the basis of that determination.

The statute is largely silent on how the assessment is to be made, so this might be seen as a perfect candidate for Chevron deference. Again, however, the Court did not cite Chevron or discuss deference, other than by reference to the principle of tax law that an IRS assessment based on an estimate is within its statutory authority if “the method used to make the estimate is a ‘reasonable one.’” The Court then went on to explain why the IRS’s aggregate estimate was a reasonable one.

Justice Souter, joined by Justices Scalia and Thomas, dissented. His analysis of the statute, and more importantly its context and history, led him to the conclusion that the use of the “aggregate estimate,” with its assessment only against employers without determining or assessing employees’ tax liability, was inconsistent with the statutory design.

**Cases Held Over from Last Term**

There do not appear to be any administrative law blockbusters among the 47 cases granted but awaiting review. There are, however, less significant cases, if still important to the parties, involving administrative law issues.
Barnhart v. Peabody Coal, Co., and its companion case, Holland v. Bellaire Corp., (see Peabody Coal Co. v. Massanari, 14 Fed. Appx. 393 (6th Cir. 2001) (unpublished), and Bellaire Corp. v. Massanari, 14 Fed. Appx. 424 (6th Cir. 2001) (unpublished)), raise an interesting case of statutory interpretation. In 1992 Congress enacted the Coal Act to provide additional sources of financing for health benefits for miners covered by the United Mine Workers of America’s health benefits fund. One of the methods was to assign financial responsibility for certain workers whose prior employers no longer exist to certain existing coal operators. According to the statute, “the Commissioner of Social Security shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator.” Lo and behold, Social Security had not assigned all eligible beneficiaries to signatory operators by that date. Indeed, it apparently is still assigning beneficiaries. Operators assigned after that date have argued that after that date Social Security no longer has statutory authority to make assignments. Social Security argued that the date of “termination” means the date when Social Security lost all authority to make new assignments. The Sixth Circuit rejected use of Chevron deference to the agency on the grounds that the statute was clear: on October 1, 1993, the agency lost all authority to make further assignments. Subsequently, the Fourth Circuit also rejected use of Chevron deference, but because it found that the statute clearly did not deprive the agency of authority to make new assignments. See Holland v. Peabody Coal Co., 269 F.3d 424 (4th Cir. 2001).

Environmentalists are rightly concerned about the Court’s granting review in Borden Ranch Partnership v. U.S.A.C.E., 261 F.3d 810 (9th Cir. 2001), arising from an appeal by a rancher from civil penalties imposed for destroying a wetland. The Court acknowledged three questions presented: whether the deep plowing of a wetland “adds” a pollutant so as to constitute a regulated discharge under the Clean Water Act, whether such plowing constitutes normal farming within the meaning of the Act so as to qualify for an exemption from regulation, and whether penalties authorized not to exceed “$25,000 per day for each violation” would support treating each pass of the plow as a separate violation. Both of the first two issues have been more or less routinely decided by a number of courts uniformly in favor of the Corps’ interpretation of the statute. The grant of certiorari accordingly does not bode well for environmentalists.

Nevada Dep’t of Human Resources v. Hibbs (decided below as Hibbs v. Dep’t of Human Resources, 273 F.3d 844 (9th Cir. 2001)) raises another Eleventh Amendment issue. The Family and Medical Leave Act requires employers to provide unpaid leave to their employees for certain family and medical situations. Hibbs sued his employer, the Nevada Department of Human Resources, for damages and injunctive relief, alleging that it had violated his FMLA rights. Nevada asserted that because it had not waived its sovereign immunity, the Eleventh Amendment barred the suit against it. The question presented is whether the FMLA is a valid exercise of Congress’s power under the Fourteenth Amendment, which can override a state’s Eleventh Amendment immunity. The court of appeals held that it was, contrary to decisions in seven other circuits. Expect this to be another 5–4 decision by the Supreme Court. The only question is whether Justice O’Connor will be swayed by the government’s claim that the FMLA was enacted to remedy the effects of gender discrimination.

And then there is a tax case asking whether a Treasury regulation lawfully interprets the Internal Revenue Code. Boeing Co. v. United States, 258 F.3d 958 (9th Cir. 2001). The Ninth Circuit cited and applied Chevron, saying that the regulation is a legislative regulation adopted pursuant to an explicit grant of statutory authority. It then found the interpretation permissible and upheld it, contrary to the result in an earlier Eighth Circuit case, St. Jude Medical, Inc. v. Commissioner, 34 F.3d 1394 (8th Cir. 1994). The Eighth Circuit did not rely on Chevron, apparently because that court believed the regulation was “not promulgated pursuant to a specific grant of authority,” but was “promulgated pursuant to the Commissioner’s general grant of [rulemaking] authority.” The court said that it therefore would apply the deference standard articulated in National Muffler Dealers Ass’n v. United States, 440 U.S. 472, 476–477 (1979), which it believed was “consistent” with the Chevron standard. In any case, despite that deference, it held that the regulation’s interpretation was unreasonable because it was inconsistent with Congress’s intent. Don’t expect to see elucidation of the Chevron doctrine in this case.

News from the Circuits continued from page 9

mind, then there is no final agency decision until the agency responds to the request.

The lesson: either do not seek reconsideration, or be sure to file another petition for review within by the deadline following denial of the request for reconsideration.

Ninth Circuit Grants Chevron Deference to Informal Interpretive Statement

In 2000, Christensen v. Harris County seemed to close
the door on *Chevron* deference for agency statements issued without notice and comment. A year later, *US v. Mead* pushed it back open for informal agency statements as to which there was “some other indication of a comparable congressional intent” to delegate the interpretive issue to the agency. *Barnhart v. Walton* wedged the door open a bit more by stating that the availability of *Chevron* deference “depends in significant part upon the interpretive method used and the nature of the question at issue,” and then applying a multi-factor test to determine whether *Chevron* governed the particular interpretation.

The Ninth Circuit took advantage of these openings in *Schuetz v. Bank One Mortgage Corp.*, 292 F.3d 1004 (2002), to grant *Chevron* deference to an interpretive statement issued by HUD without notice and comment. As in *Christensen*, the case involved consideration of an informal agency statement in a lawsuit between private parties. Schuetz, a mortgage borrower, challenged a “yield spread premium” paid by her lender to the mortgage broker that had arranged the loan. Schuetz claimed the payment was a kickback prohibited by the Real Estate Settlement Procedures Act (RESPA), while Bank One argued that the payment was a legitimate part of the overall fees paid for the mortgage broker’s services.

HUD was specifically authorized not only to issue rules and regulations implementing RESPA, but also “to make such interpretations . . . as may be necessary to achieve the purposes” of RESPA. RESPA, as implemented by HUD’s regulations, generated much litigation, creating uncertainty about “lender payments to mortgage brokers for services performed.” Congress then directed HUD to clarify its position on such payments within 90 days of the enactment of the 1999 appropriations bill. HUD actually issued two policy statements stating that the payments in question were not per se illegal and should be judged under a test that turned out to favor Bank One’s position. HUD issued the first statement after consulting with relevant stakeholders, but HUD never pursued the notice and comment rulemaking process.

The Ninth Circuit held that *Chevron* deference was due to the HUD policy statements despite the fact that they had not been issued through the rulemaking process. The court relied upon the specific statutory authorization to issue interpretations, the fact that the statements had been published in the Federal Register, and the fact that Congress had required HUD to issue the statements within 90 days. The court distinguished *Christensen* on the ground that HUD was specifically authorized to interpret the statute, had responsibility for enforcing the statute, and had expertise in the area in question. Applying *Chevron* deference, the court upheld HUD’s interpretation.

It is not clear why the Ninth Circuit thought these considerations were sufficient to trigger *Chevron* deference. Perhaps the strongest argument would be that the specific interpretive authority and the directive to act within 90 days indicated a congressional intent that the resulting policy statement should have the status necessary to resolve the dispute that had arisen about this aspect of RESPA. If that is the basis for the opinion, its influence should be limited. However, the court’s reference to HUD’s responsibility to enforce the statute and its expertise in the area could be used to argue for *Chevron* deference to a wide array of informal agency statements.

**Third Circuit (en banc) Uses Absurdity Principle to Overcome Chevron Deference and Ease Disability Requirements**

Pauline Thomas was an elevator operator. She sat in the elevator and made it go to the floors sought by those who entered. With the exception of the patronage jobs at the U.S. Capitol, one would be hard pressed to find an elevator operator these days. When Pauline Thomas’ job was eliminated, she applied for disability benefits based upon a long history of heart ailments and other conditions. The Social Security Administration rejected her application on the ground that she was capable of performing her previous work, but it did not allow her to try to prove that the position of elevator operator no longer existed in the national economy. The agency based its decision on Step Four of the applicable regulations, under which the applicant must show that she is not able to perform her previous work. Since Ms. Thomas was still able to perform as an elevator operator, she was not permitted to move on to Step Five of the regulations. Under Step Five she would have been able to address the question of whether the position of elevator operator, or any other position that she could perform, was available in significant numbers in the national economy.

Challenging the denial, Ms. Thomas argued that she should have been permitted to attempt to show that the position of elevator operator no longer existed in the national economy. The Third Circuit, *en banc*, ruled for Ms. Thomas on the ground that the statute unambiguously supported her position. Even if the statute were ambiguous, however, Ms. Thomas would prevail because “a statute should be read to avoid absurd result.” *Thomas v. Commissioner of Social Security*, 297 F.3d 568 (3d Cir. 2002).

The statute provides that one is disabled if he is “not only unable to do his previous work but cannot, . . . engage in any other kind of substantial gainful work which exists in the national economy.” Although this appears to create two distinct threshold requirements, the majori-
ty found that the language “any other” made it clear that a claimant could seek to prove that her “previous work” no longer existed in the national economy. Finding the statute unambiguous on this point, the majority thereby initially avoided the difficulties posed by Chevron deference.

The majority continued, however, by asserting that “even if the statutory were ambiguous, a statute should be read to avoid absurd result.” Finding “no plausible reason why Congress might have wanted to deny benefits” simply because they were capable of doing a job that no longer existed, the court held that Thomas should have been permitted to show that the position of elevator operator was obsolete. The extensive dissent did not dispute the legitimacy of relying on the absurdity principle to avoid Chevron deference. Rather, it presented several arguments for the proposition that Step Four of the regulation was plausible reflection of congressional intent.

For the Social Security practitioner, Thomas opens the door to arguments that a claimant may be “disabled” even if she is capable of performing her previous position, which is now obsolete. For others, it demonstrates that the absurdity principle may be used to overcome both the apparent meaning of statutory language and the prospect of Chevron deference.

In Indiana, the Office of Medicaid Policy and Planning can point to three new rules to prevent seniors from sheltering income and assets to meet Medicaid’s definition of poverty. Two of the new rules took effect in June, 2002, 405 Ind. Admin. Code §§ 2–3-1.1 and 2–3-1.2; a third is in the final stages of the rulemaking process. These rules allow state officials to count additional assets to assess whether Medicaid will pay for nursing home care. The intended result is that seniors who can afford it will have to use their own money.

The first rule addresses the transfer of property; the second deals with buying annuities. These rules prevent applicants from investing in rental property and then giving it away or buying annuities to preserve money for their children and grandchildren. The third rule addresses money held in bonds even if they cannot be cashed right away. Seniors who violate the state’s new rules can be denied coverage for up to three years.

Views on the proposed rule changes are wide ranging. Some assert that the new rules will stop Medicaid from being a program that protects inheritance. Others claim the new rules simply call for more creative planning by lawyers. Taken together, the rule changes could result in savings of up to $32 million dollars a year for Indiana’s state treasury.

including 5,309 lawyer members, 236 associates and 6,112 law student members.

Publications
Publications Committee Chair Randy May reported that Eleanor Kinney’s timely new book, “Guide to Medicare Coverage Decision-Making and Appeals,” was published just before the annual meeting and that copies were available at the ABA bookstore during the meeting. He said the committee was working with ABA publishing on a marketing plan. He noted that Michael Asimow’s “A Guide to Federal Agency Adjudication,” which will be a useful companion to Jeff Lubbers’ “A Guide to Federal Agency Rulemaking,” is in production and should be published by the fall 2002 Administrative Law Conference. A book on the Sunshine Act will also be in production by the end of the year. He reported that sales of books in inventory are generating revenue for the section. He said the Publications Committee continues to work with ABA publishing in promoting all section books.

Budget Report
Budget Officer David Roderer gave a report on the Section’s 2001-02 budget. He said that due to some “belt-tightening” revisions to the budget this spring, the Section is in much better fiscal shape than had originally been forecast. He said that the Section had not received sponsorships for several of the seasonal meetings – although they had been budgeted – so he and staff were working hard to identify other cost savings.

Election of Officers at Annual Meeting of the Section
Chairman Gray read the report of the Nominating Committee. See 27 ADMINISTRATIVE & REGULATORY LAW NEWS, No. 4, Summer 2002. Upon motion and second, the committee’s recommended nominees were approved.
A Complete List of Books from the ABA Section of Administrative Law and Regulatory Practice

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