

ADMINISTRATIVE & REGULATORY LAW NEWS



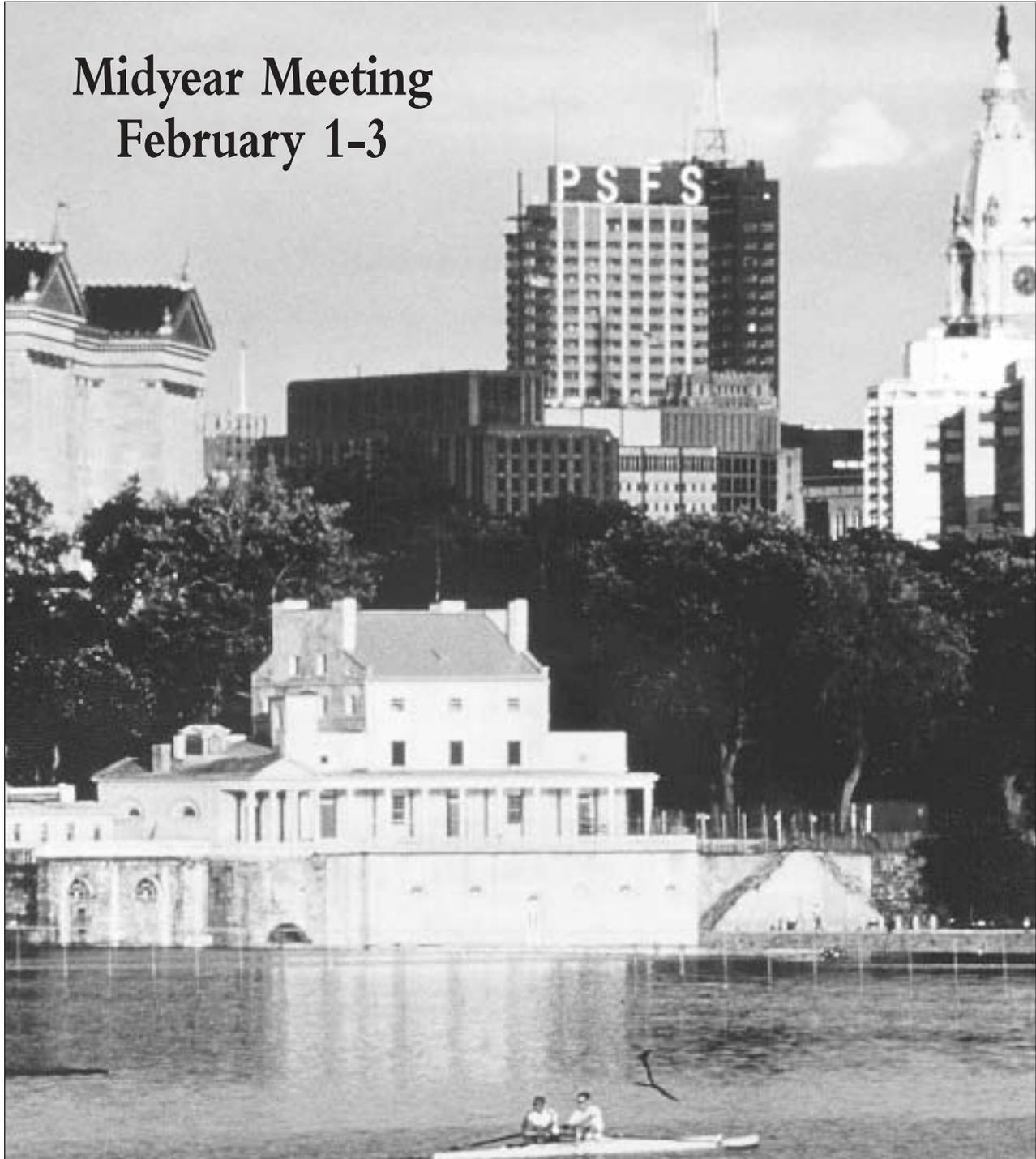
Section of Administrative Law & Regulatory Practice

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Winter 2002

Midyear Meeting
February 1-3



Jim McWilliams/Philadelphia Convention and Visitors Bureau.

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Chair's Message



C. Boyden Gray

Two developments threaten the importance of the ABA Ad Law Section's restatement of the APA even before the ink is dry on this monumental effort: (1) the rapid globalization of dispute resolution both in the European Union and at the World Trade Organization (WTO) and (2) the rapidly growing importance of health care services delivered by the government in ways that are currently beyond the discipline and transparency of the APA.

The first problem stems from the fact that few of our trading partners, including Europe, have as democratic, open and reviewable a process as we do for establishing environmental and other regulatory standards, and almost none has equaled our level of actual pollution control. The United States has, in the APA, a process for participation by affected parties that increases their support for the result ultimately reached. In other countries less concerned with process, the result may mean less environmental regulation overall, for example, but the level of regulation is likely to be less even-handedly applied and thus also have less support and compliance.

Unfortunately, Europe has been successful in painting the United States as the international environmental scofflaw (for opposing Kyoto), thus diverting attention away from its own failure to provide the same level of public health protection. The problem with the WTO is that we may end up paying more and getting fewer benefits, and losing some of the procedural protections of the APA in the process.

How can this occur? Recent history suggests that the more the United States tightens its environmental protections beyond those of its trading partners, the more it risks endangering those protections by having them characterized as trade barriers subject to WTO resolution. The problem here is that the WTO looks seriously to European procedures for administrative guidance and then resolves the dispute *against* the most restrictive regime. While this might seem, at least in the short run, as a potential victory for industry supporters who might be complaining in the United States of overregulation, a closer look reveals a potentially different picture.

What is likely to result is the kind of unfair, unlevel playing field that disadvantages the United States the most. This is because the challenge to a U.S. rule in an international forum like the WTO is likely to be successful only *after* U.S. industry has probably made all the

investments necessary to comply. Thus, even if the WTO ruling could be interpreted as an opportunity to rollback U.S. regulation, the bulk of the compliance costs will already have been incurred. If these costs have not been incurred, the rollback will exact a different price – namely, the undemocratic international cancellation of a democratically developed U.S. rule. While this might sometimes work to the advantage of U.S. economic interests, there are times when it may not — because the alternative rule may impose very high costs relative to the benefits achieved, even if those costs are lower than the U.S. approach, and may disadvantage U.S. firms vis-à-vis European firms.

For example, the European Union has adopted the so-called “proportionality” principle from Germany, which says a state can extract environmental or other protections only in the “least restrictive” manner possible. While this might be music to industrial ears in the United States, it might not in actuality turn out that way if those who apply this principle do so in a way that favors European interests over those of the United States. Practitioners in the United States know full well the manner in which agencies can utilize their vast discretion to fashion unfair results unless procedural fairness is scrupulously observed. Indeed, it is the antipathy to the time-honored practice of “rent-seeking” as much as the desire for economic efficiency (the antipathy and the desire are, of course, related) that has resulted in the clear trend in the United States towards adoption of performance standards, market incentives and

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

In Memoriam



Kathleen Buck



Barbara Olson

The past year saw the untimely deaths of two Section leaders, **Kathleen Buck**, who succumbed to leukemia in August, and **Barbara Olson**, who was killed in the hijacking and crash of American flight 77 into the Pentagon on September 11. The Section mourns their passing and offers its sympathy and best wishes to their families. We will miss them both.

★ ★ ★

Kathleen Buck was a partner in the Washington law firm of Kirkland & Ellis, having joined the firm in 1989 after an exemplary career in the Department of Defense. Beginning there in 1981 as an Assistant General Counsel, she went on to become General Counsel in the Department of the Air Force and then General Counsel in the Department of Defense from 1987 to 1989. She served on the Advisory Council for the U.S. Court of Federal Claims and the Board of Governors of the Claims Court Bar Association. She received the Air Force Exceptional Civilian Service Medal and twice was awarded the Distinguished Public Service Medal from the Department of Defense.

Ms. Buck was a long time member of the Section and a frequent attendee at its functions and meetings. Most recently she had served as the Budget Officer and Council Member for the Section. As a national expert on government contracting and procurement, she was a long-standing Co-chair of the Section's Public Contracts and Procurement Committee.

Ms. Buck was a graduate of St. Mary's College and received her law degree from the Indiana Uni-

versity Law School in Bloomington in 1973. After law school she worked as a legal-aid lawyer in Florida before coming to Washington to work as a lawyer for Swift & Co.

★ ★ ★

Barbara Olson, known nationally as a TV commentator, was a long and active member of the Section. To Section members and those who knew her, she was a friendly, smiling, happy person who never had a bad word for anyone, perhaps surprising to those who only knew her public persona as a Republican spokesperson and author of books highly critical of President and Mrs. Clinton.

Her legal career began after her graduation from St. Thomas University in Houston, Texas, in 1978 and from Cardozo Law School of Yeshiva University in New York, where she became intensely involved in politics. After graduation she worked for Wilmer, Cutler & Pickering in Washington. She was active in assisting in the confirmation of Justice Clarence Thomas, with whom she developed a close personal relationship. Later she became an Assistant U.S. Attorney in the District of Columbia prosecuting drug cases. In 1994, when the Republicans took control of Congress, she joined the House Government Reform and Oversight Committee, where she was chief investigative counsel in 1995 and 1996. In 1999 she joined the Washington office of Balch & Bingham, an Alabama law firm affiliated with the lobbying firm of Barbour, Griffith & Rogers. She was the author of a scathing biography of Hilary Clinton, entitled *Hell to Pay, and Final Days*, a book focusing on the end of the Clinton presidency, which she did not live to see published. She was a frequent commentator on CNN and numerous talk shows, highly sought after because of her provocative views articulately expressed. Ms. Olson and her husband Ted Olson, also a long and active member of the Section, were leaders of the new Washington Republican establishment.

Ms. Olson served as a Council Member from 1995 to 1997 and was chair or co-chair of several Section committees, including the Constitutional Law and Separation of Powers Committee, the Membership Committee, the Nominations Committee, and the Management and Planning Committee. ◆

The Year in Review: Excerpts From “Developments in Administrative Law & Regulatory Practice 2000–2001.”

By William S. Morrow, Jr.★

Anyone who thinks Administrative Law is not one of the most vibrant and controversial areas of the law today just has not been paying attention. From the flurry of President Clinton’s midnight regulations to President Bush’s suspension of those regulations to the Supreme Court’s chipping away at *Chevron*, the past year has borne witness to the federal government pushing the edges of the regulatory envelope with innovative and sometimes surprising proclamations, the effects of which will ripple throughout society and to varying degrees across the strata of our economy for sometime to come.



Annual Developments Panel: William Jordan; Jeff Lubbers; Bernard Bell; Marshall Breger.

It is not possible to chronicle in this space all of the truly significant developments in administrative law that took place during the August 2000 to October 2001 period; that is the task of the section’s annual developments book. But there is room to relate the noteworthy pronouncements highlighted at this year’s “Annual Developments in Administrative Law” program.

The panelists included: Bernard W. Bell, a vice-chair of the Constitutional Law and Separation of Powers Committee and an associate professor of law at Rutgers School of Law in Newark, NJ; Marshall J. Breger, professor of law at the Columbus School of Law, The Catholic University of America; and William S. Jordan III, professor of law at the University of Akron. Jeff Lubbers, author of “A Guide to Federal Agency Rulemaking” and editor of the section’s annual developments series, served as moderator.

★ Associate Editor for Section News.



Whitman v. ATA Panel: Richard Pierce; Robert Hahn; Boyden Gray; Lisa Heinzerling; David Schnare.

Two Supreme Court cases deservedly garnered much attention. The Court in *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001), quashed the DC Circuit’s attempt to resurrect the nondelegation doctrine (long thought to have died an ignominious death at the federal level in the late 1930s) and affirmed DC Circuit doctrine that the Clean Air Act forbids EPA from considering cost or feasibility when setting national ambient air quality standards.

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Court declared that sometimes deference is due statutory interpretations made in informal agency adjudications but not necessarily full-blown *Chevron* deference. In some such cases, only “power to persuade” *Skidmore* deference is due. *Chevron* and its progeny tend to promote a binary perspective on the issue of deference – an agency’s interpretation of its statute is due either substantial deference or none at all. *Mead*, on the other hand, with its statement that the “fair measure of deference to an agency administering its own statute has been understood to vary with circumstances,” suggests that *Chevron* deference is just one end of a “spectrum” ranging from substantial deference to some deference to no deference. If the widely diverging opinions offered at the Administrative Conference program on *Mead* are any indication, lower courts will be soon be struggling with how to tell when some deference is due and what some deference ultimately means.

Other developments also merit mention, if not as much fanfare. The following highlights are drawn from the panelists’ discussion of selected excerpts from their

chapters on Rulemaking, Judicial Review, and Constitutional Law and Separation of Powers that will appear in the forthcoming “Developments in Administrative Law & Regulatory Practice 2000– 2001.”



OIRA Panel: David Vladeck; John McGinnis; Tom Sargentich; John Graham; Elena Kagan; Sally Katzen.

Rulemaking.

When the Clinton administration departed in January 2001, it left behind a last-minute legacy of thousands of *Federal Register* pages filled with proposed and final rules—so-called “midnight regulations.” *See generally*, 65 Fed. Reg. 66,923 (Nov. 8, 2000) through 66 Fed. Reg. 6,426 (Jan. 19, 2001). For good or ill, such activity has become fairly commonplace at the end of a president’s final term. Even intra-party transfers of executive power are not immune to this phenomenon. But this does not mean the succeeding administration must completely acquiesce.

When the Bush administration took office, it promptly established a mechanism for reviewing the Clinton administration leftovers. This included postponing for sixty days the effective date of rules that had been published but not yet taken effect. *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies*, 66 Fed. Reg. 7,701 (Jan. 24, 2001). The memo also halted printing of proposed and final rules that had not yet appeared in the *Federal Register*. Independent agencies were encouraged to participate voluntarily in this review. The thinking was that this would allow President Bush time to appoint his own agency heads who could then cull the chaff.

Congressional Review of OSHA’s Ergonomics Rule

Congress got into the act, so to speak, when it invoked the provisions of 5 U.S.C. Chapter 8, popularly known as the Congressional Review Act. The Act provides in pertinent part that before a rule can take effect, the federal agency promulgating the rule shall submit to Congress a report containing— (i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule. In the case of a major rule, Congress then has a

minimum of sixty calendar days after the report is submitted to oppose the rule before it becomes effective.

The subject of Congress’s opposition was the ergonomics regulations adopted by the Occupational Safety and Health Administration (OSHA) in November 2000. 65 Fed. Reg. 68,262 (Nov. 14, 2000). The regulations became effective January 16, 2001, four days before President Bush took office, and therefore were not subject to Bush’s 60-day postponement order. OSHA estimated the regulations would have an economic impact of \$4.5 billion but industry estimates ranged from \$18 billion to \$125 billion.

The Senate passed S.J. Res. 6 disapproving OSHA’s ergonomic regulations on March 6, 2001 (Cong. Rec. p. S1887). The House passed S.J. Res. 6 on March 7, 2001 (Cong. Rec. p. H667). President Bush signed the resolution into law as Public Law 107-5 on March 20, 2001. OSHA published notice of removal the following month. 66 Fed. Reg. 20,403 (Apr. 23, 2001).



Mead Panel: Bill Funk; Dan Cohen; Mark Seidenfeld; David Frederick.

Bush Continues Clinton Regulatory Review E.O.

Judging from the Bush administration’s interpretation and enforcement of Executive Order No. 12866, “Regulatory Planning and Review,” under which the administrator of the Office of Information and Regulatory Affairs (OIRA) reviews the rulemaking activities of federal agencies on behalf of the president, OIRA will be mopping up more of the rest.

OIRA Administrator John D. Graham issued a memo on September 20, 2001, explaining that his office would review not only agency action but agency inaction as well, through the use of “prompt” letters that OIRA will employ “to suggest an issue that [the Office of Management and Budget] believes is worthy of agency priority. Rather than being sent in response to the agency’s submission of a draft rule for OIRA review, a “prompt” letter is sent on OMB’s initiative and contains a suggestion for how the agency could improve its regulations. No doubt, some of the Clinton midnight regulations will be seeing some improvement fairly soon.

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Council Capsules

A Brief Digest of Council Highlights From the 2001 Administrative Conference

Report of the Chair

Section Chair C. Boyden Gray reported that all descriptive portions of the APA Project have been submitted by the reporters for Council consideration. [See APA Project below]. Gray said he is looking forward to launching the next phase of the project which will prescribe suggested revisions to the federal Administrative Procedure Act. He thanked the organizers of this year's Administrative Conference and noted that total attendance had topped 525 – the highest attendance at any Section meeting. In a related development, Gray announced that as of September 30, 2001, Section membership was at 8,200 – an all time high. He thanked the Membership Committee and others for all their efforts in making this happen. He also thanked Council member Lynne Zushman for convening a panel on strategic nonproliferation issues and its terrorism implications this past October and Bill Morrow for acting as co-moderator. He thanked the authors of this year's Annual Developments book and especially thanked Jeff Lubbers for his indispensable work as chief editor. Finally, Gray expressed his desire that the Section continue its involvement in health care issues and noted the great turnout at the prescription drug pricing program at this year's Administrative Conference.



Council Meeting: Cynthia Drew; Tom Morgan; Neil Eisner; C. Boyden Gray; Ron Levin; Ernie Gellhorn; Dan Cohen.

APA Project

The Council gave its unanimous approval to the entire black-letter portion of the Section's APA Project, which formally got underway two years ago at the Section's annual meeting in Atlanta in August, 1999. Chief Reporter Paul Verkuil reported that the final version incorporates minor revisions since the individual statements were



Campaign Finance Panel: Lawrence Noble; Barbara E. Reed; Trevor Potter; Jack Young.

approved at prior Council meetings earlier this year.

Verkuil credited past Section Chair Ron Cass with the suggestion that the Section take on the project and said completion of this portion of the project is testimony to the spirit of scholarship in the Section. He acknowledged the hard work of the reporters and in particular the efforts of assistant reporters Michael Herz and John Duffy.

Verkuil said current plans are that the black letter statements will appear in a forthcoming issue of the *Administrative Law Review* and then be repackaged for sale in individual volumes with supporting commentaries. The Final Black Letter Statement may be viewed at <http://www.abanet.org/adminlaw/apa/home.html>

Verkuil anticipates the spring meeting will see the beginning of the prescriptive phase of the project, with consideration of suggestions for revisions to the federal Administrative Procedure Act.

Publications

Publications Committee Chair Randy May reported on the sales of current books. He said that a second mailing of a brochure touting the Section's Federal Administrative Procedure Source Book, the ADR book, and the Rulemaking book had recently gone out to approximately 6,500 Section members and other persons interested in administrative law, federal law and dispute resolution and that the Section is already seeing increased sales of those books. He reminded everyone that these books may be ordered directly from the Section's "Publications" web page at <http://www.abanet.org/adminlaw/publish.html>. May thanked Jeff Lubbers for editing the latest Annual Developments issue. He reported that Cass Sunstein's book, "The Cost-Benefit State," is in hand. It is about 200 pages, includes post-September 11 consideration, and should be published by the end of February 2002 as an ABA-featured book. Eleanor Kinney's book on Medicare coverage should be completed soon. The

book on the Sunshine Act is expected to be submitted for publishing by August 2002. He also thanked Administrative & Regulatory Law News Editor-in-Chief Bill Funk, Associate Editor for Section News Bill Morrow, and Associate Editor for State News Mike Asimow for all their hard work on the News.

Environmental Consequences of Terrorism

Section Secretary Cynthia Drew made a presentation to the Council on the ABA Standing Committee of Environmental Law's invitation to the Admin Law Section to co-sponsor a one-day colloquium on the Environmental Consequences of Terrorism, to be held this coming spring at a law school in DC. Drew explained that the Standing Committee was not looking for financial help as much as assistance with speakers and follow-up publications. Drew noted that the committee is planning 1-hour sessions each on the following broad topics — preparedness/prevention; emergency response; cleanup/financing; future torts/needed statutory, regulatory change. The proposal was unanimously approved.



ALJ Panel: Hon. Michael E. Zielinski; Hon. Edwin Felter; Dr. James A. Ogilvy; Hon. Candida Steel

ABA Commission on Women Update

Judy Kaleta, Section liaison to the ABA Commission on Women in the Profession, reported on the Commission's recent strategic planning meeting. She said there was a decision to restrict some Commission activities, including not using the Margaret Brent Women Lawyers of Achievement Award luncheon in the future for soliciting funds. She noted that nominations for the award, which recognizes women lawyers who have achieved excellence within their area of specialty and have actively paved the way to success for other women lawyers, would be due by December 28, 2001. Five awards will be presented at the ABA's Annual Meeting in August 2002. Nomination forms are available on the ABA web site. Nominees need not be members of the ABA.



Prescription Drug Coverage Panel: C. Boyden Gray; David Foster; Scott Bass; Michelle Russell-Einhorn; Dan Malone; Patrick Kelly; Eleanor Kinney.

Minority Judicial Externship Program

Council member Stephen Calkins reported on the Racial and Ethnic Minority Judicial Externship program, a full-time, eight-week summer program open to first or second-year minority law school students who want to do legal research and writing for participating state and federal judges in Illinois, Texas and California. Externs receive a \$1,500 stipend. The program was initiated by the ABA Section of Antitrust Law but is now being co-sponsored by an increasing number of sections. Calkins noted that the program involved more than merely giving money, because the Administrative Law and Regulatory Practice Section could (as the Antitrust Section does) communicate with law professors to urge them to identify and reach out to promising candidates and/or make presentation(s) at luncheons about the nature of law practice. Calkins moved, with a second, that the Section participate as a full, \$1,500 co-sponsor. The Council unanimously approved. Last Retiring Chair Ron Levin said he would send a letter to administrative law professors asking them to identify candidates. Chair Gray said he would decide at a later date whether to have the Section provide an informational presentation for a summer luncheon.

Uniform Mediation Act

The Council approved the recommendation of Section liaison Philip Harter that the Section act as co-sponsor of the Uniform Mediation Act, which Harter said will be submitted to the ABA House of Delegates for consideration at the 2002 Midyear Meeting. Harter noted that the Section has had great input into the drafting process.

According to the executive summary, the Act promotes the use of mediation as an appropriate means of dispute resolution, while also protecting the rights of

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Section Dinner Honors Past OIRA Administrators



Clockwise from left: Tom Susman; Judy Kaleta; Hon. Douglas Ginsburg; Ron Levin; Ron Cass; Christopher DeMuth; Susan Braden; Lori Davis.



Ron Cass & Boyden Gray present Section Fellow certificate to Ron Levin.



Clockwise from front left: Paul Noe; Jim Miller; DeMaris Miller; Nancy Harter; Phil Harter; Dan Troy; Tom Morgan; Linda Ammons; Ken Corsello.



Clockwise from left: Wendy Gramm; Neil Eisner; Marshall Breger; Ronald Smith; Marc Burgess; Ernie Gellhorn; Hon. Jay Plager.



Clockwise from front left: Richard Huberman; John Spotila; Lois Spotila; James Kerr; Robert Anthony; Hal Bruff; Otto Hetzel; Jack Young.



Clockwise from front left: Bill Funk; Alan Raul; James Conrad; Sally Katzen; William Jordan; Margaret Gilhooly; Jim O'Reilly; Mrs. & Mr. William Sullivan.

and New Section Fellow Ron Levin



Dinner speaker James Tozzi.



Clockwise from front left: Sid Shapiro; Charles Koch; Jeff Lubbers; Rick Belzer; Fred Emery; Andrew Emery; Michael Berg; Hon. Merrick Garland.



Tom Morgan; Hon. Jean Cooper.



Clockwise from left: Chris Dyer; Hannah Sistare; Warren Belmar; Lynne Zusman; William Allen; Charles Juister; Milton Carrow; Joan Allen.



Clockwise from left: Cynthia Drew; Susan Graham; Tom Susman; John Graham; Leonard Leo; Randy May; Philip Olsson; Paul Verkuil; Jim Tozzi; Boyden Gray.



Clockwise from left: Richard Stoll; Allison Carle; Robert Clemens; Bill Morrow; Chuck Gordon; Jodi Levine.



Section of Administrative Law and Regulatory Practice 2002 Midyear Meeting

Chair: Leonard A. Leo

Ritz-Carlton
Ten Avenue of the Arts
Philadelphia, PA 19107
Telephone: (215) 735-7700

FRIDAY, FEBRUARY 1

Registration

10:00 a.m. – 5:00 p.m. • Ritz Carlton • Outside of Pavilion Ballroom, 2nd Level

Veterans Judicial Review: Is There a Need for Reform?

10:30 a.m. – 12:00 p.m. • Ritz Carlton • Pavilion Ballroom, 2nd Level

Presented by the Veterans Affairs Committee and Regulatory Initiatives Committees. Co-Sponsored by the Government and Public Sector Lawyers Division.

At the Fall Administrative Law Conference, the Veterans Affairs and Regulatory Initiatives Committees sponsored a program that included a wide-ranging discussion of reform of the VA process for adjudicating disability claims. As a follow-up, this program will discuss a working draft of a report and recommendation by the two committees proposing reforms in the system of judicial review of decisions by the Department of Veterans Affairs on claims for veteran's benefits. Since the prior program covered the appeals system only briefly, the content of the program should be of considerable interest to persons who practice in this area. Moreover, since the report and recommendation will eventually be submitted to the Council for its adoption, the program is an opportunity to gain useful input from the panelists and audience about the recommendations that the Council will consider.

Program Chair: *Ronald L. Smith*, Chief Appellate Counsel, Disabled American Veterans, Washington, DC

Moderator: *Sidney A. Shapiro*, Rounds Professor of Law, University of Kansas School of Law, Lawrence, KS

Panelists:

- *Ronald L. Smith*, Chief Appellate Counsel, Disabled American Veterans, Washington, DC
- *Barton L. Stichman*, Joint Executive Director, National Veterans Legal Services Program, Washington, DC

Secrecy, Vulnerability or Compromise:

How Will Terrorism Affect U.S. Information Disclosure Policy & Practice

12:30 p.m. – 3:00 p.m. • Ritz Carlton • Pavilion Ballroom, 2nd Level

Presented by the Government Information and Privacy Committee

Manuals and information available to terrorists facilitated the attacks on America, yet a free society should not become captive to the manipulation of our openness against us. How will agencies, the courts and Congress adapt their Freedom of Information policies to the wartime stresses of international access to governmental disclosures within the U.S.? How should the proper balance of "freedom" of data access be placed against expanding the ease of target identification for potential attackers?

Program Chair and Moderator: *James O'Reilly*, Visiting Professor of Law, University of Cincinnati, Cincinnati, OH

Panelists:

- *Daniel Metcalfe*, Attorney, United States Department of Justice, Washington, DC
- *Mike Tankersley*, Attorney, Public Citizen Litigation Group, Washington, DC
- *Paul Verkuil*, Dean, Benjamin Cardozo School of Law, New York, NY
- *Mark Zaid*, Executive Director, The James Madison Project, Washington, DC

Securities, Commodities and Exchanges Committee Meeting

1:00 p.m. – 3:00 p.m. • Ritz Carlton • Mellon Room

Pharmaceutical Pricing: Accounting for Unrecognized Cost Savings in Healthcare

3:30 p.m. – 5:30 p.m. • Ritz Carlton • Pavilion Ballroom, 2nd Level

Program Chair and Moderator: *Edward Abrahms*, Executive Director, Pennsylvania Biotechnology Association

Panelists:

- *C. Boyden Gray*, Partner, Wilmer, Cutler and Pickering, Washington, DC

Section Reception

6:00 p.m. – 7:30 p.m. • The University of Pennsylvania President's House • 3812 Walnut (Shuttle service will be provided from the Ritz Carlton at 5:45 p.m.)

SATURDAY, FEBRUARY 2

Section Continental Breakfast

8:00 a.m. – 9:00 a.m. • Ritz Carlton • Petit Ballroom

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 12:00 p.m. • Ritz Carlton • Petit Ballroom

The Administrative States

2:00 p.m. – 4:00 p.m. • Ritz Carlton • Pavilion Ballroom, 2nd Level

Presented by the State Administrative Law Committee. Co-Sponsored by the State and Local Government Law Section

The expanded role of administrative agencies and structures of delegated lawmaking has touched not only the ever-conspicuous federal regulatory state, but has also fundamentally transformed lawmaking and law implementation within the fifty states. States have developed their own administrative mechanisms and, more fundamentally, have created their own approaches to solving the key puzzles in public administration and administrative law. For instance, the delegation doctrine, while rather moribund in contemporary federal constitutional law, remains a lively and active part of constitutional discourse in several American states.

Beyond merely describing the differences in state administrative law and procedure, there is something more fundamentally interesting at stake in considering the architecture of state administrative systems and the law pertaining to these systems. At a deep level, state administrative law and procedure differs, sometimes in important respects, from federal administrative law because of the different pulls and tugs at work in state politics and regulatory administration; it also differs because of the theoretical and practical differences between state constitutional and federal constitutional discourse.

This panel will consider the underlying issues raised by the very different patterns of state administrative law. The objective is two-fold: first, to shed light on the enterprise and objectives of state administrative law, a project of vital importance to the thousands of lawyers who practice with and before state regulatory agencies; and, second, to sharpen the assessment of federal administrative law by adding the comparative dimension, that is, the comparison of state administrative law, in theory and in practice, with federal administrative law.

Program Chairs: *Daniel Rodriguez*, Dean, University of San Diego, San Diego, CA and *Jim Rossi*, Associate Professor of Law, Florida State University College of Law, Tallahassee, FL

Moderator: *Daniel Rodriguez*, Dean, University of San Diego, San Diego, CA

Panelists:

- *Richard Briffault*, Joseph P. Chamberlin Professor of Legislation, Columbia University School of Law, New York, NY
- *Jim Rossi*, Associate Professor of Law, Florida State University College of Law, Tallahassee, FL
- *Ed Rubin*, Professor of Law, University of Pennsylvania School of Law, Philadelphia, PA
- *Alan Tarr*, Professor, Rutgers University, Camden, NJ

Section Reception and Dinner

7:00 p.m. • Brasserie Perrier, 1619 Walnut Street. One of Philadelphia's most well-acclaimed and inventive restaurants featuring contemporary French cuisine of George Perrier of Le Bec Fin fame.

Chair's Reception

10:00 p.m. • Ritz Carlton

Sunday, February 3

Section Continental Breakfast

8:00 a.m. – 9:00 a.m. • Ritz Carlton • Petit Ballroom

Section of Administrative Law and Regulatory Practice Council Meeting

9:00 a.m. – 12:00 p.m. • Ritz Carlton • Petit Ballroom

SECTION CO-SPONSORED PROGRAMS

Friday, February 1

2:00 p.m. – 5:10 p.m. • Government and Public Sector Lawyers Division • The Westin Philadelphia

Ethical Considerations in Public Sector Law

This session focuses on the unique ethical issues confronted by public lawyers using an entertaining, interactive format involving short skits to illustrate hypothetical scenarios. Topics examined include: scope of representation, public sector attorney-client privilege issues, duty to disclose lawyer misconduct and communication with represented persons. This program provides a rare opportunity for public lawyers to examine topics specifically geared to their practice. There is no cost to attend the program

Supreme Court News

by William Funk*

As this issue goes to press, the Supreme Court has only decided a handful of cases. As usual, none of these initial cases are of great import or dispute, but the very first case decided by the Court involved administrative law issues. *United States Postal Service v. Gregory*, 122 S. Ct. 431 (2001), involved the termination of a Postal Service worker under the procedures of the Civil Service Reform Act of 1978. Under that Act if an employee is covered by a collective bargaining agreement, the employee may seek relief from any disciplinary action through the negotiated grievance procedure, here arbitration. If the agency imposes *serious* disciplinary action on a protected employee, the employee alternatively may appeal the agency's action to the Merit Systems Protection Board. Before the Board, the agency then has the burden of proving its charge by a preponderance of the evidence, and it must show that the penalty imposed was reasonable in relation to the misconduct. The choice between proceeding by the grievance procedure or appeal to the Board, when the disciplinary action is *serious*, lies with the employee.

The Postal Service imposed non-serious penalties on Ms. Gregory on three separate occasions over the period April to August 1997. In each case she invoked the grievance procedure to challenge the disciplinary actions. In September 1997, however, the Postal Service terminated Ms. Gregory for a new instance of alleged misconduct. This action she appealed to the Merit Systems Protection Board. The Board had no difficulty in sustaining the Service's determination that she had engaged in the misconduct; the real issue was the appropriateness of the penalty. Under Board precedent, in assessing the reasonableness of a penalty, the Board could consider prior instances of alleged misconduct that had been subject to the grievance procedure. That precedent held that if the employee had been cleared of the misconduct by the grievance procedure, the Board would not consider that misconduct. However, if the grievance procedure had not cleared the employee, then the Board would accept the agency's determination unless the Board found it clearly erroneous. In Ms. Gregory's case, when the Board's ALJ heard her case, none of her three grievance procedures had been completed, and the ALJ found that none of the Service's disciplinary actions against her were clearly erroneous. Accordingly, in light of the previous disciplinary actions, the ALJ found that

the termination for the last incident of misconduct was reasonable. Ms. Gregory appealed to the Board. By this time, one of the grievances had in fact found in her favor, setting aside the Service's disciplinary action, but she did not apprise the Board of this development. The Board denied her request for review, and she appealed to the Federal Circuit, which reversed the Board, holding that "prior disciplinary actions that are subject to ongoing proceedings may not be used to support" a penalty's reasonableness. The Supreme Court in turn reversed the Federal Circuit, holding that the Board *may* consider prior disciplinary actions subject to ongoing proceedings to support a penalty's reasonableness, but it remanded the case for consideration of the effect of the reversal of one of Ms. Gregory's disciplinary actions in assessing the reasonableness of her termination.

Under the CSRA, the Federal Circuit is to uphold the Board's decision unless it is unsupported by substantial evidence or is arbitrary, capricious, or an abuse of discretion. In an opinion for the Court by Justice O'Connor, the Court found nothing arbitrary in the Board's independent consideration of disciplinary actions that were subject to ongoing grievance proceedings in assessing the reasonableness of the penalty imposed.

The Court noted that prohibiting any consideration of disciplinary actions pending in grievance proceedings would require the Board either to delay its determination until the conclusion of all grievance proceedings, potentially causing undue delay, or to ignore altogether the prior disciplinary actions, which in many cases would foreclose consideration of the employee's disciplinary history, probably the most important factor in assessing the reasonableness of a penalty. Having concluded that some consideration by the Board of prior disciplinary actions pending in grievance proceedings was authorized and reasonable, the Court might have addressed whether the *actual* consideration – assessing whether the agency actions were clearly erroneous – was reasonable. Justice O'Connor, reflecting her preference for decisions with the least possible scope, wrote for the Court that the adequacy of the actual review was either not before the Court or, if it was, there was a lack of sufficient briefing of its particular functioning in the case. Accordingly, the Court remanded the case for further consideration.

Two justices disagreed with the Court's failure to address the adequacy of the actual consideration given to the disciplinary actions pending in grievance proceedings. Justice Thomas believed the question was presented and the answer simple – clearly erroneous review is permissible. In his view, the fact that the CSRA provides no

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appellate review by the Board of minor disciplinary penalties suggests that *any* collateral review of such actions by the Board would suffice in the course of assessing the reasonableness of a penalty for a serious violation. On the other hand, Justice Ginsburg, who also believed the question was fairly presented, wrote to indicate her opinion that the actual consideration was inadequate with respect to disciplinary actions.

Future Administrative Law Cases

Among the cases argued and waiting decision or for which certiorari has been granted are a number of administrative law or regulatory practice cases. None of the administrative law cases appear to have the potential of a *Mead* (*United States v. Mead*, 121 S. Ct. 2164 (2001)) in terms of importance, but there are at least two major regulatory practice cases. One involves the so-called TELRIC pricing structure adopted by the Federal Communications Commission under the Telecommunications Act of 1996 that may have substantial effects on the course of telephone competition. See *Verizon Communications, Inc. v. FCC*, decided below sub nom. *Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000). This massive case has been before the Supreme Court once already, see *AT & T Corp. v. FCC*, 525 U.S. 366 (1999), and now after a decision on remand is back again and was argued on October 10. The other is *New York v. FERC* decided below sub nom. *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), another massive case, this one with substantial implications for electricity restructuring. Predictably, both of these cases will involve *Chevron* questions as well as the application of judicial review to exercises of agency judgment.

A case with less appeal to national law firms is *Dept. of Housing and Urban Development v. Rucker*, decided below sub nom. *Rucker v. Davis*, 237 F.3d 1113 (9th Cir. 2001)(*en banc*). Here the application of *Chevron* split the Ninth Circuit as to HUD's interpretation of a housing statute requiring subsidized housing to contain certain lease terms. The statute requires the lease to provide for eviction of a public housing tenant for "any drug-related criminal activity on or off [the] premises engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control." HUD's interpretation is that this requires the lease to provide for eviction even when the public housing tenant neither knew nor had any reason to know of the drug activity. An interesting twist in this case is that HUD's interpretation occurred in the preamble to its regulation, not in the regulation itself. Espe-

cially after *United States v. Mead*, this twist might have critical importance.

Another dispute over an agency's interpretation of its statute is raised in *Massanari v. Walton*, decided below sub nom. *Walton v. Apfel*, 235 F.3d 184 (4th Cir. 2000). The Social Security Act defines "disability" as:

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. . . .

42 U.S.C. § 423(d)(1)(A). Mr. Walton was diagnosed as schizophrenic and found unable to engage in substantial gainful activity (SGA among the trade). Unfortunately for his disability benefits claim, however, he was able to return to SGA (a job) in less than 12 months from the onset of the mental impairment, although the medical evidence was that his mental impairment continued. Social Security denied his claim, interpreting the statutory definition as disqualifying a person if they return to SGA in less than 12 months. The Fourth Circuit found the statute clear, clearly tying the 12 month period to the mental or physical impairment, not to the inability to engage in SGA. It therefore reversed Social Security's denial of benefits. Watch for this case to be reversed. What will be more interesting will be the way it is reversed. Will the Court itself make a plain language determination to the contrary, which given the language would seem difficult? Will it give deference to the agency's interpretation as contained in a Social Security Ruling and in a proposed rule, and if so, what kind of deference? Or will it give deference to the agency's interpretation as contained in the actual adjudication of Mr. Walton's claim, and if so, what kind of deference? Or will the Court not pay a lot of attention to how it reaches its result, thereby tending to confuse rather than clarify the standards of judicial review of agency interpretations not contained in legislative rules?

In *Ragsdale v. Wolverine Worldwide, Inc.*, 218 F.3d 933 (8th Cir. 2000), argued on January 7, the Court will consider whether a regulation adopted by the Secretary of Labor under the Family and Medical Leave Act is beyond the agency's statutory authority. The Act specifies the circumstances under which employees are eligible for the potential twelve weeks of unpaid leave under the Act, and it authorizes the Secretary of Labor to "prescribe such regulations as are necessary to carry out [the Act]." The Secretary has adopted regulations that require employers

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News from the Circuits

Agency Amicus Brief Denied *Chevron* Deference

In *Matz v. Household International Tax Reduction Investment Plan*, 265 F.3d 572 (7th Cir. 2001), the Internal Revenue Service filed an amicus brief in a class action case involving a claim to benefits under the Employee Retirement Income Security Act as a result of a partial termination of a pension plan. As one of the agencies with authority to regulate partial terminations, the IRS opined in an amicus brief that all terminated participants, both vested and unvested, should be counted in determining whether a partial termination had occurred. The effect of such counting would be to make a partial termination less likely to be found, endangering the pension rights of unvested participants. In its first go-round, the district court accepted the IRS position, calling it “reasonable,” albeit suggesting that it would have only counted non-vested participants (making partial termination easier to find) if it had been deciding the case for itself. The court of appeals affirmed, but the Supreme Court remanded the case for reconsideration in light of *United States v. Mead*. On remand the Seventh Circuit noted that the Supreme Court had given *Chevron* deference to an amicus brief in *Auer v. Robbins*, 519 U.S. 452 (1997), but the court believed that *Mead*’s analytical framework supplanted that in *Auer*. The interpretation in the amicus brief neither had the force of law nor had the elements of formality the court believed *Mead* had identified as the hallmarks of an interpretation worthy of *Chevron* deference. Applying *Skidmore* deference, the court found the IRS’s interpretation unpersuasive, inasmuch as it would undermine the purposes of the Act, to protect the interests of unvested participants.

FAA’s Continued Refusal to Grant Exemptions to its Airline Pilot Age Sixty Rule Upheld Once Again

Under the Federal Aviation Act of 1958, the FAA is required to promulgate regulations “in the interests of safety” setting “maximum . . . periods of service of air-men.” However, the Act also contains a provision authorizing the FAA to grant exemptions from any of its requirements, if it finds the exemption is in the public interest. In 1959 the FAA adopted its Age Sixty Rule, which prohibits any person 60 years old or over from serving as a commercial pilot. It based the rule upon its conclusion that “as men approach age 60” they are more prone to sudden incapacitation from heart attacks or strokes and that “it is impossible to predict with accuracy those individuals most likely

to suffer attacks.”¹ Over the years, this rule has been attacked, considered, and reconsidered a number of times, but the FAA has refused to change it, and no court has found the FAA’s decisions arbitrary or capricious. Moreover, despite numerous attempts by individuals to obtain exemptions from the rule, the FAA has refused to grant any individual exemptions from the rule. In 1995, in an attempt to head off further exemption requests, the FAA “further hardened its stance” by adopting the policy that further requests would be summarily denied unless they proposed a technique not previously considered and rejected for assessing an individual pilot’s abilities. In *Yetman v. Garvey*, 261 F.3d 664 (7th Cir. 2001), 69 pilots brought suit to challenge the FAA’s denial of their coordinated effort to obtain exemptions under this new policy. They alleged the FAA’s denial was arbitrary because the FAA has acted inconsistently, allowing pilots over 60 to fly if they are employed by foreign air carriers or, for a four year period, if they were employed by commuter airlines. The FAA explained the first situation as based on the United States obligation to follow an international convention on civil aviation that allows co-pilots to be over 60 years old; it explained the second situation as a temporary phase-in measure when the FAA generally extended commercial airline safety requirements to commuter airlines, justified by the desire not to upset the “reasonable expectation” of commuter airline pilots under the prior rules that they would be able to fly past the age of 60. Neither of these explanations was irrational, the court said, so the inconsistency was not arbitrary. Similarly, the fact that the FAA would allow pilots under 60 to continue flying even when they had been diagnosed with disqualifying diseases was not an arbitrary inconsistency, because in these circumstances the agency has “been able to develop a means of assessment and surveillance specially designed to demonstrate the individual’s capabilities and to identify any adverse changes.” The pilots also argued that the FAA acted arbitrarily in not accepting their Age Sixty Exemption Protocol, provided to the agency by a panel of experts, and designed to be able to identify through a large battery of tests persons fully capable of continuing to fly. However, most of the elements of this protocol had been rejected in earlier cases and the one novel aspect of the protocol

¹The case did not raise the issue, but apparently the FAA’s basis for the Age Sixty Rule contains no data on women, yet the rule applies equally to men and women pilots.

raised particular predictive problems. Ultimately, however, the case was all about the burden of proof. As the proponents of the sought-for exemption, the pilots had the burden to show that granting the exemption would not decrease safety. The court acknowledged that were the burden on the FAA to show that granting the exemptions would decrease safety, it might not be able to satisfy that burden.

D.C. Circuit Voids EPA Rule Extending its Clean Air Act Title V Federal Operating Plan Authority to Areas in which Indian Country Status is in Question and Requires EPA to Decide Jurisdictional Disputes by Notice-and-Comment Proceedings rather than by Adjudication

The 1990 Amendments to the Clean Air Act require states to adopt a permit program for stationary sources of air pollution (the Title V program), or else EPA will adopt a federal plan for the state. Those amendments also authorize EPA to treat Indian tribes as States, so that Indian tribes likewise could establish Title V permit programs. Under EPA's Tribal Authority Rule, EPA provided that tribes could exercise Title V jurisdiction only where they had jurisdiction under federal Indian law, and the rule provided a procedure for resolving jurisdictional disputes. In fact, no tribe has sought or received authority to operate a Title V program. Hence, EPA adopted a rule in 1999 establishing a federal permit program throughout Indian country, and it defined Indian country to include any area "for which EPA believes the Indian country status is in question." Moreover, EPA provided an adjudicatory procedure for resolving disputes as to whether an area was Indian country or not. *Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001), raised two issues: one was the validity of the definition of Indian country, the other was the lawfulness of deciding disputes as to particular areas by means of adjudication. As to the first issue, the court applied the plain language of the CAA to hold that EPA's authority to operate a federal program only arises when a state or Indian tribe fails to operate an approved program. Thus, EPA's authority to operate a federal program in lieu of a tribe in a state with an approved state program could only extend to areas subject to tribal jurisdiction, which would not include areas where that jurisdiction was simply "in question." In reaching this conclusion, the court rejected EPA's call for *Chevron* deference, not on the grounds that the law is unambiguous but on the grounds that EPA was not

delegated general authority to operate federal programs, but only in specified circumstances, and therefore it is not entitled to *Chevron* deference to its claimed general authority, citing *Mead*. As to the second issue, the court recognized that normally the choice of whether to proceed by rulemaking or adjudication lies in the informed discretion of the agency, but here, the court said, the CAA was clear. When a state submits a proposed Title V operating plan to EPA, the CAA requires the state to show that it has "adequate authority" to carry out the program. The CAA then clearly requires EPA to go through a notice-and-comment proceeding to approve or disapprove the state plan. The court believed that a showing of "adequate authority" necessarily includes resolution of any disputed geographical jurisdictional issues, for otherwise the state would not have adequate authority over the area in question. Because EPA had provided for a separate adjudication, not involving public notice-and-comment, this was inconsistent with the statutory procedure.

Seventh Circuit Rejects IRS's Interpretation of its own Regulation Using *Skidmore* Deference

In *U.S. Freightways Corp. v. Commissioner of Internal Revenue*, 270 F.3d 1137 (7th Cir. 2001), Freightways challenged the IRS's determination that it must capitalize, rather than expense, the cost of the large number of permits, licenses, fees, and insurance premiums it must pay each year. These items, referred to as FLIP expenses, are all of an annual duration but are not coordinated with the taxpayer's fiscal year. Thus, the benefit of the expense extends beyond the year in which the payment is made. The Treasury Regulation specifies that when a benefit extends "substantially beyond the tax year" its cost is to be capitalized. The IRS has consistently interpreted "substantially" in litigation to mean more than one month beyond the tax year. The court recognized that the issue involved interpretation of a regulation, rather than that of a statute. Nevertheless, it discussed *Chevron* and *Mead* and concluded that because of the informality of the interpretation here and the context in which it has arisen, it "is a clear case for the flexible approach *Mead* described." Applying *Skidmore*, the court found the agency's interpretation unpersuasive and ruled for the taxpayer. ◆

Recent Articles of Interest

Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17 (2001). Noting that reason has become the modern language of law in a liberal state, Professor Mashaw in his Robert L. Levine Distinguished Lecture asks: Why do reasons matter? What reasons count? And when do reasons satisfy our longing for justice? In attempting to answer these questions, he focuses on administrative law as the paradigmatic realm of law concerned with giving reasons. Not only does the legislative realm not concern itself with the giving of reasons for its actions, but even the judicial realm is shot through with the acceptance of a lack of reasons, extending from settlements to jury verdicts. Thus, the legitimacy of legislative or judge-made law draws on sources other than rationality or reason-giving. Whereas Congress may repeal a statute for no other reason than the party that passed it no longer is in power, an administrative agency that repealed a regulation solely on the basis that the administrator that adopted it had been replaced by a person with a different perspective would be reviled, as well as reversed. Rationality has been the touchstone of modern administration from Weber to Landis, but the need to explain that rationality is more recent, beginning modestly with the APA in 1946 and reaching full flower in the “hard look” movement of the 1970s. “‘Expertise’ is no longer a protective shield to be worn like a sacred vestment. It is a competence to be demonstrated by cogent reason-giving.” Professor Mashaw concludes that modern administrative government is a “triumph of legitimate, liberal governance in a world full of dangerous alternatives,” but today we are in the midst of “post-modern anxiety about administrative governance.” He assesses but ultimately rejects public choice theories as explaining this anxiety. Rather he turns to the German philosopher Jurgen Habermas for the concept that what is lacking in modern administration is authenticity and its particular brand of justice. By this Mashaw means the failure of modern administration to attend to the personal and moral in its embrace of rules and rationality. The “reasons” for a rule contained in a cost-benefit analysis, for example, ignores the social morality of the rule – for example, the value of a human life, whether it should indeed be measured in monetary terms, whether any such monetary valuations should be discounted for the future, and so on. Mashaw emphasizes that he is not criticizing administrative law’s requirements for rational action reasonably explained, but he is suggesting that it should not be so limited. Thus, he calls for broadening the domain of administrative reason, not abandoning it.

James T. O’Reilly, *Entrepreneurs and Regulators: Internet Technology, Agency Estoppel, and the Balance of Trust*, 10 CORNELL J.L. & PUB. POL’Y 63 (2000). Smaller businesses have many questions when dealing with complex regulations, and prudent agencies are using internet tools to “rain and explain” to entrepreneurs. Yet reliance on the agency’s advice is generally barred by doctrines against administrative estoppel. This article explores estoppel and the alternative models for agencies to consider. Congress might expand the “duty to assist” that now occurs in certain benefit programs to agencies’ advice obligations generally. Costs and other barriers to such a duty are explored as well.

Brian S. Prestes, *Remanding Without Vacating Agency Action*, 32 Seton Hall L. Rev. 108 (2001). In the last decade courts reviewing agency action have increasingly opted to remand the challenged regulation to the agency without vacating. This trend is likely to continue or accelerate. Because courts’ ability to remand without vacating agency action effectively bars relief from successfully challenged regulations, the legality of remanding without vacating is a critical question for regulated parties, courts, and agencies alike. This article argues that remanding without vacating arbitrary or insufficiently reasoned agency action is unlawful. After arguing that the ambiguous practical benefits of remanding without vacating do not justify brushing the legal arguments under the rug, this article concludes that the text of the APA, along with the legislative history, statutory purpose, canons of construction, and judicial precedent demonstrate the illegality of remanding without vacating.

Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Business-like Government*, 50 AM. U. L. REV. (forthcoming). This article discusses the National Performance Review’s (NPR’s) broad-reaching effort to reinvent government by making it more businesslike, focusing on its successful effort to reform the Federal procurement process. The article shows that the reformed system couples greatly increased buyer discretion with dramatically reduced oversight of government spending – both internal and external. This article asserts that this combination erodes the public’s confidence in the procurement system, violates established norms, and is antithetical to a host of Congressional mandates and policies. More particularly, the article provides empirical evidence of the dramatic, sustained reduction in government contract related litigation during the 1990’s. The article expresses concern because the trend coincided with two significant

changes: (1) a large-scale Congressionally-mandated reduction in acquisition personnel, which materially reduced internal oversight, and (2) the sweeping NPR re-invention initiatives, which considerably increased purchaser discretion. The article offers a provisional list of explanations for the decrease in litigation. It asserts that, in this context, litigation – a form of external monitoring initiated by private attorneys general – is a public good. Reduced litigation relating to the award and performance of the government's contracts threatens the public's trust in the reinvention agenda. Litigants, in this context, serve the public interest while pursuing their own self interest. Moreover, the need for the private sector to provide this service increases as internal oversight decreases. The article suggests that, despite the success of procurement reform, the current paradigm elevates its facially attractive norms – efficiency and discretion – at the expense of other established, yet apparently undervalued, norms that guide the procurement system, e.g., transparency, integrity, and competition. It cautions that businesslike government has diluted existing internal and external oversight mechanisms and threatened sustained public confidence in the procurement system.

Mark Seidenfeld, *Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. (forthcoming January 2002).

Those who have recently written about the impact of judicial review on agency decisionmaking have not treated the practice kindly. Many express concern about the burdens that review places on agencies, and some even conclude that judicial review hurts the quality of the decisions the agency makes when adopting a new rule. These critics, however, treat the agency and the particular decisionmakers within it as if they react as rational maximizers of utility towards the incentives created by judicial review. At most they give some passing reference to psychological constructs of how individuals and groups make decisions. This article takes as a major premise that psychology has much to tell us about the ways in which decisions deviate from the assumptions that public choice theorists and others who rely on economic rationality use in evaluating the workings of our governmental institutions. Individuals do not tend to optimize every decision, but instead rely on personal decision rules whose use becomes habit as well as more generally shared rules of thumb as shortcuts to making decisions. In certain situations, these shortcuts can lead to avoidable bad decisions. One mechanism for avoiding careless or improper reliance on such shortcuts is to

hold the decisionmaker accountable for her choice. If structured properly, accountability can attenuate many of the systematic biases that flow from improper use of decisionmaking shortcuts. The structure of beneficial accountability corresponds closely to the nature of judicial review of agency rulemaking under current standards of arbitrary and capricious review. There is also reason to believe that agency staff members react to judicial review of a rule as they do to direct accountability for an individual decision. In addition, arbitrary and capricious review is likely to reduce any magnification of individual biases that result from the group nature of agency decisionmaking. Hence, arbitrary and capricious review provides incentives for agency staff to take appropriate care and to avoid many systematic biases when formulating rules and ushering them through the rulemaking process. This does not mean that judicial review will eliminate all decisionmaking biases. There is at least one bias – the propensity of individuals to avoid extreme choices even when logic dictate otherwise – that judicial review might even exacerbate. In addition, review will never prevent all biased decisionmaking; it can only encourage decisionmaking processes that reduce the probability of bias. Finally, the psychological results the article discusses come predominately from laboratory experiments, some of which involve different individuals performing different tasks than those involved in writing agency rules. Hence, the suggestion that judicial review improves the quality of agency rulemaking must be seen as just that – a suggestion. Nonetheless, there is enough evidence to warrant further consideration of the likely impact of review on the performance on agency staff, and more particularly to refute critics who, without considering this evidence, conclude that judicial review has a deleterious impact on the quality of rulemaking.

Cass Sunstein, *Cost-benefit Default Principles*, 99 MICH. L. REV. 1651 (2001). One of the main purposes of this article is to demonstrate that federal law has now built a novel set of rules for statutory construction: the cost-benefit default principles. In brief, these principles (1) allow de minimis exceptions to regulatory requirements; (2) authorize agencies to permit “acceptable” risks, departing from a requirement of “absolute” safety; (3) permit agencies to take account of both costs and feasibility; and (4) allow agencies to balance costs against benefits. Taken as a whole, the cost-benefit default principles are making a substantial difference to

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New Federalism Executive Order?

With the recent reports on the availability and price of various forms of energy, President Bush might claim that his Executive Order 13211 in May 2001 requiring a Statement of Energy Effects before an agency took a “significant energy action” was highly successful. Others might doubt the connection. Nevertheless, the administration still seems poised to issue a new executive order on federalism to replace President Clinton’s EO 13132 in 1999, which in turn replaced President Reagan’s EO 12612 in 1987.

Almost a year ago President Bush announced to a meeting of governors that he had directed his administration to seek ways to roll back federal regulations that restrict or burden states. In July a draft proposed Executive Order was floated among certain interest groups as well as within the government. It received warm support from organizations representing states, but organizations representing business were less than enthusiastic. As President Reagan discovered early in his administration, leaving regulation to the states, as opposed to eliminating regulation altogether, is a nightmare to industries doing business in the several states. Such businesses generally prefer uniform federal regulation to differing requirements in several states. Thus, language in the draft EO allegedly making it more difficult for agencies to preempt state regulation was not thought to be beneficial by industry groups, even while it was applauded by state organizations. The U.S. Chamber of Commerce apparently was particularly concerned that language in the proposed EO would further encourage the development of safety standards through product liability litigation rather than through federal regulation. The Chamber also urged more emphasis on undoing unfunded mandates. The Financial Services Roundtable similarly is supposed to have asked for the exemption from the order of the

Comptroller of the Currency and the Office of Thrift Supervision, so as to facilitate the development of a national banking system under uniform standards.

The Consumer Product Safety Commission is reported to have commented that the Order should not apply to independent regulatory commissions.

In general, the proposed order allegedly followed the outline and substance of the Reagan order, rather than the Clinton order. However, it contained a list of specific mandates not contained in either order, in order to provide more specificity to the order. It was the mandate opposing preemption of state law that caught the attention of the business groups. Another mandate of interest is one against regulation of “non-economic activities.” Apparently, Attorney General Ashcroft does not place a high value on this mandate, with his highly publicized decision to reverse the Clinton administration’s decision not to enforce the federal controlled substances law against Oregon’s state-approved physician assisted suicide.

Like the Clinton and Reagan orders, the proposed new order would require a federalism assessment as a procedural matter before an agency could propose or adopt a regulation having federalism implications.

Apparently, the events of September 11 delayed the issuance of a new order from early in the fall to reportedly early in the new year.

Some commenters have noted that in light of past experience under both the Reagan and Clinton orders, the language of the order may not be as important as the level of commitment to enforcing compliance with its terms. Some have thought that, especially with the Clinton order, issuance of the order was viewed by the administration as the end of the issue, rather than the beginning of a new direction. These observers worry that President Bush might also wish simply to take credit for issuing the order and then ignore the issue thereafter. ◆

The Year in Review

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Graham has made no secret of his intention to review agency rulemaking with an emphasis on cost-benefit analysis. Consistent with this approach, Executive Order No. 13211, signed by President Bush last May, directs federal agencies to submit to OIRA a Statement of Energy Effects with respect to each significant regulatory action that is likely to have a significant adverse effect on the supply, distribution, or use of energy, or that is designated by the administrator of OIRA as a significant energy action. 66 Fed. Reg. 28,355 (May

22, 2001). The statement is to identify any adverse effects on the nation’s energy supply, distribution or use that might result from the proposed action and describe reasonable alternatives and their expected effects.

Judicial Review

Aliens 1; Birds 0.

Aliens won a preclusion battle in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), with the Supreme Court holding that aliens are entitled to habeas relief on issues of pure law in deportation proceedings notwithstanding 1996 amendments to the Immigration and Nationality Act of 1952 that the agency argued preclude judicial review. Finding

a lack of clear statement precluding habeas relief in the 1996 Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, and citing historical immigration law practice, the Court chose a construction that avoids substantial constitutional questions, i.e., a serious Suspension Clause issue would arise if the 1996 amendments had withdrawn habeas power from federal judges and provided no adequate substitute.

Birds, however, took it on the beak when the Court adopted a similar approach in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). The United States Army Corps of Engineers (Corps), had interpreted §404(a) of the Clean Water Act to confer federal authority over an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds. The agency relied on its “Migratory Bird Rule” published in 1986. 51 Fed. Reg. 41,217. The Court found that Congress’ concern for the protection of water quality and aquatic ecosystems did not extend to ponds that are not adjacent to open water — rejecting the agency’s argument that Congress had acquiesced to the agency’s expansive construction.

In July 1977, the Corps formally adopted 33 CFR § 323.2(a)(5) (1978), which defined “waters of the United States” to include “isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.” The agency argued that Congress was aware of this more expansive interpretation during its 1977 amendments to the CWA. Specifically, the agency pointed to a failed House bill, H. R. 3199, that would have defined “navigable waters” as “all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce.” 123 Cong. Rec. 10420, 10434 (1977).

The Court ultimately rejected the agency’s plea for *Chevron* deference to avoid the serious questions it would raise with respect to Congress’s authority to regulate local lands under the Commerce Clause and the potential for significant impingement of the States’ traditional and primary power over land and water use.

Constitutional Law & Separation of Powers

Fourth Amendment:

In *Ferguson v. Charleston*, 532 U.S. 67 (2001), the Supreme Court found a state hospital’s nonconsensual testing of pregnant mothers for illegal drug use an unreasonable search under the Fourth Amendment, rejecting the hospital’s argument that it was conducting an administrative search qualifying for the “special needs” exception to the warrant requirement.

In the fall of 1988, staff members at a public hospital

operated by the Medical University of South Carolina (MUSC) in Charleston became concerned about an apparent increase in the use of cocaine by patients who were receiving prenatal treatment. MUSC subsequently began performing drug screens on urine samples from maternity patients who were suspected of using cocaine. If a patient tested positive, she was then referred to the county substance abuse commission for counseling and treatment. The threat of law enforcement intervention was used to ensure the program’s success, and some patients were arrested.

Respondents advanced two principal defenses to the petitioners’ claim that their 4th Amendment rights were violated: (1) that, as a matter of fact, petitioners had consented to the searches; and (2) that, as a matter of law, the searches were reasonable, even absent consent, because they were justified by special non-law-enforcement purposes. The Court assumed a lack of consent for the purpose of addressing the need for a warrant and then remanded for factual findings on the consent issue.

The Court distinguished this case from previous “special needs” cases sustaining drug tests for railway employees involved in train accidents, *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602 (1989), for United States Customs Service employees seeking promotion to certain sensitive positions, *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), and for high school students participating in interscholastic sports, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). In those cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.

The Court said the critical difference between the previous drug-testing cases and this one, however, lies in the nature of the “special need” asserted as justification for the warrantless searches. In each of the earlier cases, the “special need” that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State’s general interest in law enforcement. In this case, however, the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment. While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence for law enforcement purposes in order to reach that goal.

Epilogue

These are just a few of the highlights from the upcoming “Developments in Administrative Law & Regulatory Practice 2000-2001,” to be distributed to section members as a benefit of membership. Nonmembers should be able to purchase copies from the section’s web site when they become available. ◆

Section Calendar



Spring Meeting

The Jefferson Hotel

Richmond, Virginia

April 19-21, 2002

Annual Meeting

The Park Hyatt

Washington, DC

August 9-11, 2002

2002 Administrative Law Conference

Ritz Carlton Hotel

Washington, DC

October 17-19, 2002

Chair's Message *continued from page 2*

cost-benefit analysis and balancing.

But these three trends are largely absent in Europe, at least at the current time. So are the principles of openness and review that characterize the APA. The signs are that England, which has had an administrative regime closer to ours, is beginning to take on aspects of the Continental system. The question, then, is how to preserve the substantive and procedural values of the United States at the WTO, when they are more or less absent in the European Union to which the WTO will be looking more than the U.S. model. This is a fit question for the Ad Law Section to ponder and the hope is that the Section will take a look at it.

The second development relates to trends in the delivery of health care, which is a growing part of everyone's life, especially as the baby boom generation ages. Issues relating to the delivery of health care have typically been resolved without the protections of the APA. This has not in the past been the occasion for much concern, because individual physicians, hospitals and patients have been able to muddle through decisions that generally cannot await resolution by such techniques as informal rulemaking. Even the question

of HMO litigation has not so excited the public as to convince it that the patients' Bill of Rights is not perhaps a cloak for the lawyers' right to bill.

But this is likely to change as access to prescription drugs becomes more and more important. Unlike millions of individual doctor decisions in the home, clinic or hospital, the availability and pricing of drugs are much more visible and capable of public characterization. The difference in cost between a brand-name drug protected by patent and an off-patent generic is well understood by the public and thus by politicians. Twenty years ago, moreover, three-quarters of all cancer therapy was delivered in hospitals, available generally only to wealthy or well-insured people who live in or near cities. Today, more than three-quarters of cancer care is available on an outpatient basis in community settings in both urban and rural areas. Drugs have replaced hospitals, in short. Although the need for doctors is the same (if not enhanced), the change has meant a more than 50% cut in the cost of cancer care accompanied by an explosion in its availability to the general public.

Drug pricing and physician compensation are thus coming into clear focus. Can administrative law, as we know it, handle the issues that are going to be raised with greater frequency? Today most Health Care Financing Administration (HCFA) (now Centers for Medicare & Medicaid Services (CMS)) pricing decisions are not judicially reviewable. Will the same be true of

drug pricing decisions, especially if Congress enacts a prescription drug plan? Because of the rapidity of drug developments, it is now a fact that most — maybe as many as 80% — of all key drugs have no competition because they are still on patent. But is this state of affairs frozen? The Food and Drug Administration (FDA) has a practice of subjecting an applicant for a new drug approval to a higher standard if there is a similar drug already on the market. This is justified, apparently, on the ground that FDA has only limited resources to review new drugs and approving a second drug for the same indication only needlessly increases the risks of side effects. But the indirect pricing and competitive impacts of this policy are going to raise more and more questions

as drugs consume a larger and larger role in health care, especially in comparison to hospitalization.

There is today essentially no judicial review of a decision either to grant or deny approval of a new drug for health care delivery. If the Congress adopts a market model for delivery of new prescription drugs, there may be no need to improve the procedure by which the government makes pricing and delivery decisions, because the marketplace will sort it out. But if Congress simply adds a drug benefit to the existing Medicare system — which is breaking down — then the talk of adequate procedures to review governmental decisions may raise serious issues of fairness. Hopefully, the Ad Law Section can make a contribution to these unfolding health care problems. ◆

Council Capsules *continued from page 7*

participants in the mediation processes. It is intended to strengthen existing state laws and court rules by providing a strong mediation privilege that permits the parties, mediator, and non-party participants to prevent the use of mediation communications in legal proceedings — including civil and criminal trials, arbitrations, administrative hearings, and legislative “proceedings”— that take



Past Chairs. Standing: Ron Levin; Ron Cass; Richard Wiley; Warren Belmar; Ed Grenier; Tom Morgan; Paul Verkuil. Kneeling; Ernie Gellhorn; Jack Young; Charles Ablard

place after the mediation. This privilege will assure that mediation communications in one state will not be subject to admissibility in another state.

The Act does not apply to mediations involving labor unions, student peer mediations, and judicial settlement conferences.

The Act permits disclosures of threats of bodily harm, reports of abuse and neglect, and to establish that a mediation was used as a pretext to further a crime, that a mediated settlement agreement was induced by fraud or duress, or that the mediator engaged in professional mal-

practice or misconduct. The Act also provides parties with the ability to be accompanied by a friend, family member, or lawyer, and requires the disclosure of conflicts of interest by a mediator, and requires a mediator to disclose his or her qualifications when asked. Finally, the Act provides that, except as required by open meeting and open record laws, mediation communications are confidential to the extent agreed to by the parties.

The Act may be viewed at <http://www.pon.harvard.edu/guests/uma/>.

USDA Practice & Procedure

The Agriculture Committee recommended transfer of jurisdiction over U.S. Department of Agriculture (USDA) rules of practice from the agency’s Office of General Counsel (OGC) to some other office inside the agency. The committee believes that lodging such jurisdiction in the OGC gives the agency an unfair advantage because the OGC represents USDA officials in administrative proceedings. The committee believes that this is one of the reasons why under USDA rules only the agency may move to dismiss on the pleadings. The Council recommended that the committee look at how other agencies handle this issue and then work with the Adjudication Committee in drafting a recommendation to transfer jurisdiction to some other office within the agency with a less apparent conflict. ◆



Telecommunications Panel: James Haralson; John Rogovin; Steven Augustino; Donald Verrilli; J. Gregory Sidak; Brad Ramsay.

Supreme Court News *continued from page 22*

to give notice to employees when they receive leave under the Act that the leave is covered by the Act, although there is no statutory provision authorizing or requiring such notice. This notice ensures that employees know that their rights and limitations to the leave are governed by the Act. Under the regulations, an employer's failure to give this notice results in the employee still retaining his or her twelve week entitlement. Under Wolverine's employment policy, employees could receive up to seven months of medical leave. Ragsdale was diagnosed with cancer and was granted medical leave, but she was never informed that the leave was pursuant to the Act or that she had a right to FMLA leave. After the seven months of leave, Wolverine terminated her. She maintains that because she never received notice pursuant to DOL's regulations, she is entitled to an additional 12 weeks of leave. The Eighth Circuit, joining most other circuits, held that the DOL regulations were not authorized by the FMLA. The court indicated that it was not holding that notice requirements would always be invalid, but any requirement that would have the effect of giving an employee more than 12 weeks of leave was beyond the authority of the FMLA, which carefully limited its leave period to a maximum of 12 weeks.

One day later, the Supreme Court heard argument on a similar issue. In *Edelman v. Lynchburg College*, 228 F.3d 503 (4th Cir. 2000), the lower court in a split opinion found beyond the agency's authority the Equal Employment Opportunity Commission's regulation allowing a verified complaint to relate back to the time of the original complaint in order to meet the statutory deadline. Under Title VII, in "deferral" states (states

which have state EEO systems) a Title VII plaintiff must file a charge within 300 days of the alleged discrimination. A separate provision of Title VII requires that charges must be "in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." The EEOC has adopted a regulation providing that

a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including the failure to verify the charge, or to clarify or amplify allegations made therein. Such amendments ... will relate back to the date the charge was first received.

Professor Edelman filed his charge within the 300 day period but it was not under oath. Five months later, and beyond the 300 day period, he filed an amended charge, providing the required oath. Under the regulation, the new charge related back in time to the original filing and hence was timely. The Fourth Circuit, however, found the regulation beyond the plain language of the statute, which it interpreted as requiring the complete, verified charge to be filed within 300 days. Judge Luttig, concurring in the judgment but not the opinion, noted that the term "charge" was nowhere defined in the statute, and the statute did not by its terms specifically link the time limitation to the in writing and under oath requirement. Thus, he was unable to conclude that the two provisions were necessarily linked to create a 300 day limitation for filing the verified charge in writing. While he conceded the majority's interpretation was probably the best interpretation of the provisions, he felt constrained to accept the agency's reasonable interpretation, given the lack of statutory clarity. ◆

Recent Articles of Interest *continued from page 17*

regulatory policy, both because of their effects in litigated cases and because of their systemic consequences for regulation. At the same time, the cost-benefit default principles remain mostly the creation of the U.S. Court of Appeals for the District of Columbia. At the time of the writing of the article, it was not clear whether the Supreme Court would ultimately adopt them. Professor Sunstein attempts to explain here why the principles make a good deal of sense and deserve general support. Even if broadly accepted, however, the default principles raise many questions. For the most part, the cost-benefit default principles say what agencies are permitted to do.

It is not clear whether the default principles also mean that when statutes are ambiguous, agencies will be required to do any of these things. Nor do the principles give much indication of how agencies permitting "acceptable" risks, or engaging in cost-benefit analysis, might be expected to proceed. There can be no doubt that the cost-benefit default principles have emerged as a central part of what amounts to the federal common law of regulatory policy. Of course, most of that common law, including the incipient federal common law of cost-benefit analysis, will emerge, and is emerging, from regulatory agencies, which have to decide how much to regulate, and why. But courts will

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undoubtedly play an important role, and it is in the interaction between agencies and judges that binding law will emerge. There is a still more general point in the background. The steady emergence of the cost-benefit default principles signals the impending conclusion, in all branches of government, of a “first generation” debate over whether cost-benefit analysis is desirable. That debate appears to be terminating with a general victory for the proponents of cost-benefit analysis, in the form of a presumption in favor of their view. The “second generation” debates raise difficult questions about how (not whether) to engage in cost-benefit analysis—how to value life and health, how to deal with the interests of future generations, how to generate rules of thumb to simplify complex inquiries, how to ensure that agencies do what they are supposed to do, how and when to diverge from the conclusion recommended by cost-benefit analysis, how to determine the roles of agencies and courts in contested cases. An especially important “second generation” question is when, if ever, the presumption in favor of cost-benefit balancing is rebutted. Part II of this article traces the rise of cost-benefit default rules in federal law. It begins with the emergence of cost-benefit principles, outlines statutory formulations, and then elaborates the default rules. Part III explores the underlying considerations in some detail—what supports the use of default principles generally and these default principles in particular. In Part III, the article addresses the general question of when the presumption in favor of the principles might be rebutted. Part IV turns to the question whether agencies

should be required to do what the cost-benefit default principles permit them to do. Part V deals briefly with a set of issues that an agency must address if it is going to engage in cost-benefit balancing.

Collections

2001 Focus Issue: The Development of Regulatory and Administrative Mechanisms in International Environmental Law, 13 GEO. INT’L ENV. L. REV. 801 (2001). Jose-Roberto Perez-Salom, *Sustainable Tourism: Emerging Global and Regional Regulation*; Charmian Barton, *Aiming at the Target: Achieving the Objects of Sustainable Development in Agency Decision-making*; William L. Thomas, *The Green Nexus: Financiers and Sustainable Development*; Deborah Katz, Note, *The Mismatch Between the Biosafety Protocol and the Precautionary Principle*; Karen McMillan, Note, *Strengthening the International Legal Framework for Nuclear Energy*; Natalie Laura Bridgeman, *World Bank Reform in the “Post-policy” Era*.

Symposium: Globalization, Accountability, and the Future of Administrative Law, 8 IND. J. GLOBAL LEGAL STUD. 341 (2001). Alfred C. Aman, *Introduction*; Anne-Marie Slaughter, *The Accountability of Government Networks*; Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*; Alfred C. Aman, *The Limits of Globalization and the Future of Administrative Law: from Government to Governance*; Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: a Labor Law Critique of Codes of Corporate Conduct*. ◆

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