Administrative & Regulatory Law News

Section of Administrative Law & Regulatory Practice

Vol. 25, No. 4 American Bar Association Summer 2000

In This Issue

Chair's Message

John Hardin Young

We are in the midst of a re-examination of the role of government and of the administrative process. From "reinventing" government to defining deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the focus is on the appropriate role of government and the level of public services needed. We are skeptical of agency decisions, but prepared to be deferential.

Our view of government depends, far too often, on our most recent experiences with it. The long view of how and why government performs certain functions is lost in the haze of the politics of the moment.National politicians appear unable to ignite any real call for reform of government. Although calls for such things as campaign finance reform and performance review appear on the scene, they lack passionate constituencies that can ensurepassage.

We favor federalism and a desire that many decisions be made on the state and local levels, but express doubts when a state acts in ways contrary to our views on issues we espouse.

It is time for reform, and for reform to be part of the campaigns for national, state and local government. From the states we are learning that reforms — welfare reform being a good example — work. Common sense approaches are possible for our institutions from schools to transportation to international affairs. These reforms are all rooted in how administrative processes work. Paramount in the design and execution of administrative law is fair hearings conducted before an independent and qualified administrative judiciary, rulemaking proceedings that are transparent, and agency decisions that are unbiased. These were among the goals of the Administrative Procedure Act when it was enacted in 1947, and they remain with us as the Section of Administrative Law and Regulatory Practice pursues a restatement of administrative law.

How the next administration deals with administrative law and policy will be important to how well our government works. Will the new administration strengthen the process, by advancing the careers of government servants who provide the backbone to government functions, or succumb to the trend to make more political appointments without regard to expertise? Will the new administration tackle the ossification of the rulemaking process? Will the new administration reform the adjudication process to ensure fair, just and speedy decisions? We will have to wait and see. In the meantime, this Section will continue to examine these and other questions about the law that governs government.

Chair-Elect's message

Messages from the Chair-Elect are not a regular feature of this newsletter. But when the topic at hand is the Section's future, why shouldn't the Section's future Chair step up to the podium?

Ron Levin

Every so often, an organization needs to take stock of its current directions and ponder how it can best adapt to a changing environment. To this end, the Section officers hosted a long range planning session at the Spring Meeting in Williamsburg. About two dozen active Section members gathered to brainstorm about where we stand and what we can become. In order to further this same process of collective self-examination, this column will serve to report on the planning meeting and to invite further input from the Section's membership at large.

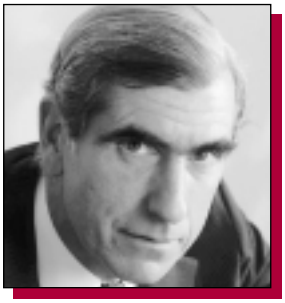
continued on page 14

ADMINISTRATIVE & REGULATORY LAW NEWS

(ISSN 0567-9494)
Published by the ABA Section of Administrative Law and Regulatory Practice, 740 15th Street, NW, Washington, DC 20005-1002.*Editor in Chief*: William Funk, Lewis & Clark Law School, Portland, OR 97219, (503) 768-6606; FAX (503) 768-6671; e-mail: funk@lclark.edu. *Associate Editor for Section News* William S. Morrow, Jr., e-mail:wmatc@erols.com. *Associate Editor for News from the States* Michael Asimow, e-mail: asimow@law.ucla.edu. Staff Director: Leanne Pfautz, ABA, 740 15th Street, NW, Washington, DC 20005-1002, (202) 662-1665; FAX: (202) 662-1529; e-mail: pfautzl@staff.abanet.org.

Nominations for 2000-2001

Chair: Ronald Levin (St. Louis, MO) – Henry Hitchcock Professor ofLaw at Washington University School of Law at St. Louis. Ron has served as Chair-Elect during the past year and in the past has served on the Council and been Chair of the Judicial Review Committee.



Chair-Elect: C. Boyden Gray (Washington, DC) – private practice with the law firm of Wilmer, Cutler & Pickering. Boyden served as the Section Vice Chair this past year and has been a speaker on several Section programs.

Vice-Chair: **Neil R. Eisner** (Washington, DC) – Assistant General Counsel for Regulation and Enforcement at the U.S. Department of Transportation. Neil is currently Vice Chair of the Rulemaking and Transporation Committees and Co-Chair of the Mary C. Lawton Government Service Award Committee. He has been a frequent speaker at Section programs.

Secretary: Cynthia A. Drew (Washington, DC) – attorney with the Environmental and Natural Resources Division of the U.S. Department of Justice. Cynthia has served as Secretary for the past two years, Co-Chair of the Environmental and Natural Resources Regulation Committee and Section liaison to the ABA Standing Committee on Environmental Law.

Assistant Secretary:**Jonathan J. Rusch** (Washington, DC) - Special Counsel for Fraud Prevention in the Fraud Section of the Criminal Division at the U.S. Department of Justice. Jonathancurrently Chairs the Section's Membership Committee and Co-Chairs the Regulatory Initiatives Committee. He has been a frequent speaker at Section programs.

Budget Officer: **Kathleen A. Buck** (Washington, DC) – private practice with the law firm of Kirkland & Ellis. Kathleen has been Assistant Budget Officer for the past two years. She is Co-Chair of the Public Contracts and Procurement Committee and Section liaison to the ABA Public Contract Law Section.

Assistant Budget Officer: David W. Roderer (Washington, DC) – private practice with the law firm of Goodwin, Procter & Hoar. David is Co-Chair of the Banking and Financial Services Committee and has been a frequent speaker at Section programs.

Council: **John F. Cooney** (Washington, DC) – private practice with the law firm of Venable Baetjer Howard & Civiletti. John is Co-Chair of the Mary C. Lawton Government Service Award Committee and Vice Chair of the Constitutional Law & Separation of Powers Committee.

David Frederick (Washington, DC) – Office of the Solicitor General, U.S. Department of Justice. David is Co-Chair of the Constitutional Law & Separation of Powers Committee and has been a frequent speaker at Section programs.

continued on page 22

Council Capsules

A Brief Digest of Council Highlights From the 2000 Midyear Meeting

New Events and Programs

The chair and chair-elect announced the following new events and programs:

Annual Fellows Debate –Leonard Leo is planning a program for later this spring on federalism. It is hoped that Senator Thompson will participate. It will be billed as the First Annual Fellows Debate.

Government Administrative Law Institute – Neil Eisner is working on a program, to be held this summer, that will focus on the interpretation of statutes and regulations in light of plain-english mandates. It will be billed as the First Annual Government Administrative Law Institute.

Randy May, Jeff Lubbers, and Tom McGarity at the Section reception Friday evening.

Programs for appointees and new hires – An ad-hoc long range planning committee has recommended that the section consider sponsoring an administrative law program for presidential transition team members and new appointees. The committee also suggested that the section develop a basic administrative law program for lawyers new to government and/or administrative practice.

Publications

Warren Belmar reported that *The Lobbying Manual* and *Guide to Federal Agency Rulemaking* continue to sell well and that the *Developments* book has been mailed to all section members. He said that the *Federal Administrative Procedure Sourcebook* should be out this summer and that the *ADR Deskbook* should be out this fall. Also ready to go to print is a monograph on redistricting. Belmar noted that there are several other publications in the pipeline.

Federal Circuit Jurisdiction

The council approved the recommendation of the Veterans Affairs Committee that Congress expand the Federal Circuit's jurisdiction to include review of questions of law not based on statutes or regulations when deciding appeals from the Court of Appeals for Veterans Claims (Veterans Court).

The council tabled this proposal at the 2000 Midyear Meeting to allow the Committee time to hear from the Department of Veterans Affairs (VA). Committee Vice-Chair Stephen Purcell reported that the VA had since announced its opposition based on a perception of undemonstrated need and a fear of increased caseload burden. Purcell said the committee felt the VA's position was not well founded and cited instances where the Federal Circuit expressly declined to review a question of law decided by the Veterans Court because it was not based on a regulation or statute.

Chair Jack Young, Phil Harter, and Joe Sullivan at the Section reception Friday evening.

Chair-Elect Levin offered an amendment to the resolution that would substitute "review of all purely legal issues" for "review of all questions of law" to ensure that the recommendation did not go beyond what was needed to fix the existing problem. The recommendation was approved as amended.

Bob Anthony and Lynne Zusman at the Section reception Friday evening.

Ombudsmen Best Practices

The council approved the following recommendation of the Ombudsman Committee:

> BE IT RESOLVED, that the American Bar Association recommends that (a) public and private entities rely on offices of "ombudsmen" to receive, review and resolve complaints, and (b) such offices adhere to the attached Standards for the Establishment and Operation of Ombudsman Offices. [the standards may be found on the Web at: abanet.org/adminlaw/ombuds]

The council considered this matter at the 2000 Midyear Meeting and requested that the committee make revisions and present a modified recommendation and report at the spring meeting. Sharan Levine briefed the council on the changes that had been made to the recommendation and report since the Midyear Meeting. She noted that the recommendation draws on an archived policy statement approved by the ABA in 1969 and expands on that statement by identifying independence, impartiality and confidentiality as essential characteristics of the office. Levine said the committee worked with numerous ombudsmen from various entities in federal, state and local government, academic institutions, companies and non-profit organizations. She said the committee believes the standards will help eliminate consumer confusion over the role of ombudsmen, help entities assist in protecting individual rights, and help entities self govern in an ethical manner.

ALJ Appointments under the Fairness in Asbestos Compensation Act

John Miller reported that this bill would establish within the Department of Justice an Office of Asbestos Compensation. The office would be headed by an administrator with authority to promulgate all procedural and substantive rules necessary to administer the Act. Miller said it is not the position of the Committee on Review of Recruitment of ALJ's by OPM to take a position on the merits of this legislation. The committee, however, does take issue with Section (101)(e) of the Act, which provides in part that the administrator will have authority to appoint administrative law judges on a temporary or emergency basis and remove such judges for good cause. The committee recommends that this sentence be removed from the proposed legislation. Chairman Young proposed that the committee prepare the appropriate blanket authority letter and circulate it to the council for further consideration.

Budget

Leonard Leo reported that although membership revenue is down, the budgets for the seasonal meetings are doing well — contributions are helping. With regard to publications, Leo said that the section is financially on track with the *News* and *Review*. Section books are turning a profit. Leo said that the *Developments* book will probably require about $15,000 to cover the cost of mailing a copy to each member on a complimentary basis. He said that the committee and project budgets are well within target. Investments have done well. He said it will be important to watch the London budget — making sure we keep our financial commitment as low as possible. The key challenge for next year will be making sure the budget is consistent with the long range planning effort. Leo advised that the section may want to consider creating an investment committee.

Incoming Budget Officer Kathleen Buck talked about the proposed budget for 2000/2001. She said the big question will be *Developments* and how to pay for it. Chairman Young noted that hopefully in future years our publications program will become self-sustaining. Incoming Publications Committee Chair Randy May said he would urge the council to look at *Developments* as a long term investment.

Program Notes From The 2000 Spring Meeting

*By William S. Morrow, Jr.**

On Interpreting the Law on Interpretations

Williamsburg served as the capital of Virginia from 1699 to 1780. Nearby Jamestown is recognized as the site of the first legislative assembly in North America under English law. So, it was fitting that the first program of the 2000 Spring Meeting, held at the Williamsburg Lodge on April 28, should be a discussion of the differences among legislative rules, interpretive rules, and policy statements. But as participants in the "What's A Rule" program quickly discovered, the roadmap through that terrain is not nearly as clear and well marked as the ubiquitous visitors maps that guide tourists through these historic villages.

Neil Eisner, Assistant General Counsel for Regulation and Enforcement at the Department of Transportation, moderated the panel. The panelists included Peter L. Strauss, Betts Professor of Law at Columbia Law School; Kathleen Kunzer, Counsel to the Chemical Manufacturers Association; Daniel Cohen from the General Counsel's Office at the Department of Commerce; and Barry Felrice, Senior manager of Regulatory Affairs for DaimlerChrysler Corporation.

Professor Strauss began with a recap of relevant language in the Administrative Procedure Act. Section 551(4) defines a "rule" in pertinent part as an "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." Section 552(a)(2) provides in pertinent part that a statement of policy, interpretation, or staff manual that affects a member of the public may not be relied on by an agency against a party if it has not been indexed and made available or published, or if the party has not had actual and timely notice of its terms.

Daniel Cohen pointed out that under Executive Order No. 12866 a rule is an agency statement of general applicability and future effect "which the agency intends to have the force and effect of law." Strauss noted that NHTSA publishes its Chief Counsel's interpretations on its web site and advises that members of the regulated industry and public may rely on them. But Cohen warned that interpretations may not offer the safe harbor they appear to create inasmuch as agencies enforce rules, not interpretations, and specific circumstances may take someone outside the protection of a particular interpretation. Kunzer responded that perhaps it is incumbent on the agency to issue a caution about exceptions. Cohen suggested that what interpretations may be are rebuttable presumptions, not safe harbors.

Felrice commented that it is not feasible for agencies to put every detail necessary for enforcement in the rule itself. This makes interpretations valuable as aids for the regulated to avoid unnecessary contests. He also expressed the opinion that if an agency announces an exception to an interpretation it should be applied prospectively only. Strauss noted that a recent DC Circuit case required notice and comment to change an interpretation once the interpretation had been published and relied upon over a period of time.

On the effect of the SBRFA's congressional review provisions, Strauss opined that if an agency wants an interpretation to have a legal effect, it must submit the interpretation to Congress but need not wait 60 days.

On the issue of challenging interpretations, Felrice advised petitioning the agency for a rulemaking. When it was pointed out that not everyone has sufficient resources to challenge an interpretation in this manner, Felrice observed that an entity operating in a regulated industry should consider whether it makes sense to continue in that line of business if it lacks the means to challenge agency action.

Strauss highlighted the following quote from Judge Randolph's recent opinion in *Appalacian Power Co. v. EPA*, No. 98-1512 (D.C. Cir. Apr. 14, 2000):

> If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State per-

continued on page 14

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

APA Project Reaches Critical Mass

*By William S. Morrow, Jr.**

Panels on rulemaking and availability of judicial review at the 2000 Spring Meeting in Williamsburg, VA, April 29-30, marked the latest additions to the section's Statement of Administrative Law project (ABA Project). The panelists' drafts and discussion papers may be accessed through the section's website at http://www.abanet.org/adminlaw/apa/home.html.

These were the fourth and fifth panels devoted to the project. The first panel was held at the section's 1999 Annual Meeting in Atlanta last summer and addressed administrative adjudication. The second was held at the section's 1999 Administrative Law Conference in Washington, DC, last fall and covered judicial review and governmental management. The third panel was held at the section's 2000 Midyear Meeting in Dallas, TX, last winter and addressed the Freedom of Information Act. Drafts presented at the earlier panels may be viewed through the website listed above.

Comments may be transmitted to the project reporters by using the section's Listserv, at http://www.abanet.org/adminlaw/home.html.

Rulemaking

Chief Reporter Paul R. Verkuil, dean of the Benjamin N. Cardozo School of Law in New York, acted as moderator of the Rulemaking panel. Panelists included Peter L. Strauss, chair of the Rulemaking Committee and Betts Professor of Law, Columbia University School of Law; Jeffrey S. Lubbers, author of GUIDE TO FEDERAL AGENCY RULEMAKING (3rd. ed.); and Thomas O. McGarity, past co-chair of the Rulemaking Committee and W. James Kronzer Chair in Trial & Appellate Advocacy at the University of Texas School of Law. Some of the more interesting comments from the panel and members of the audience are as follows.

Low Hanging Fruit. Lubbers suggested seven amendments to the APA's rulemaking process that he believed would be broadly acceptable. These were largely drawn from ACUS's 1993 Recommendation 93-4, a product of a committee chaired by Council Delegate Ernest Gellhorn.

- Eliminate the § 553(a)(2) exemption for loans, grants, benefits and contracts.
- Pare back the § 553(a)(1) exemption for military & foreign affairs to those matters classified as government secrets.
- Apply the petition process to rules exempt from notice and comment.
- Establish time limits for responses to rulemaking petitions.
- Codify the logical outgrowth test for deciding when a second round of comments is required.
- Require the establishment of an official rulemaking docket or file no later than the ANPRM or NPRM.
- Amend the "concise general statement of basis and purpose" language in section 553(c) to also require a preamble that contains a statement of reasons for the rule and includes a response to significant issues raised in the comments.

Preambles. Lubbers noted that the Federal Register already imposes a preamble requirement for final rules. Strauss observed that some Executive Orders impose requirements that have resulted in preambles. Gellhorn stated his belief that making agencies more careful in explaining why they did what they did is good policy.

Interpretive Rules. Strauss commented on the tension building over agency interpretations. Industry has a need for interpretations. The need to rely on interpretations puts pressure on agencies to impose additional procedures. This in turn pressures agencies to issue fewer interpretations. Strauss said this tension needs to be resolved. Jack Beermann, Professor of Law at Boston University School of Law, echoed this sentiment by counseling that the APA should specify what procedures an agency must follow when issuing interpretations and should specify the legal effect when those procedures are followed. Michael Asimow, co-reporter for adjudication, argued for a label requirement that would force agencies to state whether they were issuing an interpretation or

continued on page 15

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

Supreme Court News

*by William Funk**

The highest profile administrative law case this term was probably *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291 (2000), but the most important was probably *Christensen v. Harris County*, 120 S. Ct. 1655 (2000). While *Brown & Williamson* was important because it invalidated the federal regulation of cigarettes under the Food, Drug, and Cosmetic Act, for administrative law purposes it was merely an interesting application of the *Chevron* doctrine. *Christensen*, however, definitively answered a long-asked *Chevron* question: do interpretive rules and statements of policy receive *Chevron* deference? Answer: No.

Congress Clearly Excluded Cigarettes from Regulation under the FDCA

In *Brown & Williamson*, the Food and Drug Administration adopted regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents, relying upon language in the FDCA giving it jurisdiction over "drugs" and "devices." The FDCA defines "drugs" as articles "intended to affect ... any function of the body." It defines a "device" as an "implement ... which is ... intended to affect ... any function of the body." Nicotine, the FDA found, was a "drug," and cigarettes were "drug delivery devices." There was no dispute over whether nicotine affects functions of the body and whether cigarettes are a means by which nicotine is dispensed to the body. There was dispute, however, over whether manufacturers "intended" cigarettes to be a means to alter functions of the body. Manufacturers argued that ingestion of nicotine was an unintended byproduct of smoking and that FDA jurisdiction only reached drugs when the manufacturer makes some claim concerning the therapeutic benefit of the product. The FDA maintained that there was no requirement for a claim of therapeutic benefit and that manufacturers had intentionally designed cigarettes to provide pharmacologically active doses of nicotine to consumers. The Supreme Court assumed for purposes of argument that the FDA was correct on these points, but nonetheless held that FDA's claim to jurisdiction "contravenes the clear intent of Congress."

The Court acknowledged that its analysis was governed by *Chevron v. NRDC*, 467 U.S. 837 (1984), but concluded that *Chevron*'s step one resolved the issue; Congress had specifically addressed the question at issue. In reaching this conclusion, the Court initially stated that the reviewing court should not restrict itself to reviewing the questioned provision in isolation. Rather, the ambiguity "may only become evident when placed in context." This seemed to concede FDA's main statutory argument that the plain language of the definitions of "drug" and "device" demonstrated its jurisdiction. Moreover, if the context only created "ambiguity," one would still expect the FDA to prevail, because when a statute is ambiguous, reasonable agency interpretations are given deference under *Chevron*. Here, however, the Court believed the context was so overwhelmingly against FDA jurisdiction that it trumped the particular statutory language viewed "in isolation."

The context for viewing FDA's claim involved the entire history of both the FDA and the FDCA, as well other statutes relating to cigarettes. This context strongly favored the manufacturers. The FDA had clearly disavowed jurisdiction over cigarettes throughout its history (which the FDA now explained on the basis that at the time it had not known that manufacturers were controlling the level of nicotine in cigarettes for the purpose of hooking and maintaining smokers' dependence). Congress's other legislation relating to cigarettes likewise suggested an understanding that the FDA had no jurisdiction on the subject. Finally, the Court put significant weight on the fact that the FDCA requires the FDA to assure that all drugs and devices are safe as marketed, and the FDA was not proposing a prohibition on all sales of cigarettes, despite its determination that cigarettes are inherently unsafe. This contradiction in the FDA's reading of the statute was further evidence that cigarettes, whatever the express language of the definitions, could not be drugs or

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

devices subject to the FDCA.

The Court's decision was 5-4, in a particularly ideological line-up: Justice O'Connor writing for herself and Justices Rehnquist, Scalia, Thomas, and Kennedy, with Justice Breyer dissenting in an opinion joined by Justices Ginsburg, Stevens, and Souter. The disagreement between the majority and the dissent, however, does not turn on a interpretation of *Chevron*, or even significantly on the general concept that "context" might overrule particular, otherwise clear statutory language, but on their reading of the context in this case, which the dissent found much less clear. That said, the two opposing opinions do reflect a different attitude toward review of agency decisions "with enormous social consequences." The majority clearly found that factor here – as part of the total context — to counsel against an implicit delegation to the FDA to regulate cigarettes under the FDCA. The dissent, on the other hand, was much less troubled by such a delegation. In its view, political accountability for the decision to regulate tobacco would be assured, no matter if the decision were made by Congress or high administration officials and, therefore, there was no need for a thumb on the scales against an implicit delegation.

Of course, the difficulty with a "contextual" analysis, as Justices Scalia and Thomas usually point out, is that it empowers judges to make subjective decisions based on their own preferences masked as an interpretation of the context, with the concomitant problem that outcomes are much less predictable than when bright-line rules govern. In any case, the notion that courts should look to the total context of a statutory scheme to determine if Congress has directly addressed an issue is hardly inconsistent with *Chevron*, which originally stated that courts should employ "traditional tools of statutory construction" to answer that question.

Interpretive Rules and Statements of Policy Do Not Qualify for *Chevron* Deference

Under the Fair Labor Standards Act, governments may compensate employees for overtime work with compensatory time off, if there is an agreement between the employee and the government that compensatory time off is a way to compensate for overtime work. The FLSA and its implementing regulations require that when these agreements are in place the government employer must honor an employee request for compensatory time off within a reasonable period, so long as it will not unduly disrupt the empoyer's operations. The FLSA and its regulations set a cap on the number of compensatory time off hours an employee may accrue, and they allow the government employer to cash out (that is, pay off) accrued compensatory time off, rather than allow the employee to take all the accrued time off. In *Christensen v. Harris County*, the issue was whether a government employer could, consistent with this statutory and regulatory scheme, require an employee to take accrued compensatory time when the employee did not want to, rather than cash out the employee or wait until the employee requested time off.

The statute and regulations were silent on the matter, and the Court was unanimous that the statute was ambiguous on the subject. The Acting Administrator of the Wage and Hour Division of the U.S. Department of Labor, however, had opined in a formal opinion letter that a government employer could require its employees to take compensatory time off *only if* the underlying agreement relating to taking compensatory time in lieu of wages so provided. This raised the question whether the *Chevron* doctrine should apply, requiring deference to the agency's reasonable interpretation. In an opinion for the Court by Justice Thomas, five of the justices agreed that it should not.

The Court without any particular elaboration simply stated that this interpretation was "contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as these in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." These statements were followed with citations to three cases and Davis & Pierce's treatise. Rather, the Court said, the interpretation was subject only to *Skidmore* deference, *see Skidmore v. Swift & Co.* 323 U.S. 134 (1944)(a case also involving an opinion letter of the Wage and Hour Administrator). That deference, often referred to as "weak deference" in contrast to the "strong deference" under *Chevron*, only affords "respect" to the agency interpretation, and then only to the extent that the interpretation, in light of the agency's experience and expertise, has "the power to persuade." In *Christensen*, the Court found the opinion letter unpersuasive, and it believed "the better reading" of the statute was to allow an employer to require employees to take

continued on page 16

News from the States

*by Michael Asimow**

California Upholds Speeded up Review of Physician Cases

Speeding up the process of physician discipline has been a policy priority in California, but various proposed reforms have been stymied by the medical lobby. Today the process of removing an incompetent doctor from practice can take many years. It includes a hearing and proposed decision before a central panel ALJ with an elevated burden of proof, a decision by the Medical Board, and a superior court administrative mandamus proceeding in which the court exercises *independent judgment* on the evidence. This is a lot of due process; it is stacked in the doctors' favor, and it takes a lot of time.

Under a recent amendment, a physician cannot *appeal* the superior court decision but must seek an *extraordinary writ* in the court of appeals. This is important because the appellate court has discretion to deny the writ summarily without hearing oral argument or issuing a written opinion. Potentially, therefore, the process of revoking a license could be shortened by a year or more.

In *Leone v. Medical Board of California*, 995 P.2d 191 (2000), the California Supreme Court upheld this statute, despite a provision in the California constitution which provides: "Courts of appeal have appellate jurisdiction when superior courts have original jurisdiction." The Court held that review by extraordinary writ satisfied this clause since a writ gives the appellate court sufficient power to correct trial court errors. The Court was narrowly split, with two vigorous dissents and one grudging concurrence.

Other states concerned that the process of professional discipline is too sluggish might consider the California model of review by extraordinary writ.

Mississippi Nears Administrative Law Reform[1]

Mississippi continues to struggle to enact a version of the 1981 Model State Administrative Procedure Act. In 1999, an APAbillwas not reported out of committee because of its comprehensive scope. It wasreintroduced in the 2000 regular session as Senate Bill No. 2756 and as House Bill No. 930. The bill remains locked in the Senate Judiciary Committeebecause of state agency opposition.

The new Governor, Ronnie Musgrove has established an Advisory Group to study administrative law reform. Agency opponents of S. 2756 are well represented on the 45-member Advisory Group. The Group is to study the operation and effect of administrative procedure laws in other states and to ascertain the costs and benefits. The Advisory Group is also charged to make specific recommendations for APA reform in Mississippi with the primary goals of increasing government/agency accountability, improvinggovernment/agency responsiveness, building flexibility, protecting agency discretion where appropriate and creating a comprehensive APA proposal.

Virginia Legislature on Fishing Expedition[2]

William Fulbright is said to have observed that in Congress, "We have the power to do any damn fool thing we want to, and we seem to do it about every ten minutes." Well, ninety some miles south in Richmond, the General Assembly of Virginia is even more efficient at damn foolery. During this year's eight week term, legislators found time (when not engrossed in debate over the new state song) to consider 3,173 bills, some of them damn foolish.

Among this year's damn fool things was adoption of a second joint resolution to amend the Commonwealth's constitution so that hunting and fishing are explicitly recognized as constitutional rights. The amendment will become effective if Virginia's voters approve it in the fall election and again in 2001.

At first blush, it seems harmless enough, like constitutionalizing the national pastime. Consider, however, the wording: "the people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law." It is not far-fetched to interpret the clause about regulations and restrictions as limiting language, so that hunting could not be regulated by local government, state agencies, or the courts, even if

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

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

[2] The information in this article was supplied by Professor John Paul Jones, University of Richmond Law School.

continued on page 22

Recent Articles of Interest

Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion***, 50 HASTINGS L. J. 1275 (1999).** This article identifies a crucial distinction between ex ante enforcement regimes, which authorize administrative agencies to review approve or disapprove of regulated conduct before it occurs, and ex post regimes, which limit agencies to prosecuting and penalizing regulatory violations after they have occurred. Ex ante regimes appear in a variety of guises, but their common feature is that such regimes place the burden of inertia, delay, and inaction on regulated entities, by prohibiting them from engaging in desired activity until after agency approval is obtained, or agency disapproval is successfully challenged in the courts (ex post regimes, by contrast, leave the burden of inertia on agencies). The practical consequence of this is that ex ante enforcement powers greatly increase the substantive lawmaking power, as well as the discretionary authority of both agencies as a whole and individual agency personnel, by shielding regulatory decisions from both internal agency and judicial supervision. Because of this, Congress should be extremely cautious about granting agencies ex ante authority, especially in substantive areas where agency discretion can threaten important social interests. On the other hand, there are also potential benefits from ex ante regulatory authority, primarily in terms of preventing irremediable social harms and reducing investigatory and remedial burdens on agencies. The balance of the article identifies specific factors relevant to evaluating the wisdom of granting ex ante enforcement authority to an agency, and then applies the resulting framework to evaluate a number of existing regulatory regimes.

Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State***, 109 YALE L. J. 1399 (2000).** Last term, the Supreme Court decided *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721 (1999), an opinion that may alter the longstanding debate on congressional delegation of lawmaking power to administrative agencies. While the case primarily concerned a federalism issue, a less prominent part may have far greater significance. In that part, the Court for the first time invalidated an agency interpretation under the second step of the *Chevron* test. In this case, the Court invalidated the FCC's interpretation as unreasonable. Moreover, it did so not simply for typical process failures such as lack of sufficient evidence or explanation supporting the interpretation, as lower courts had done in the past. Instead, the Court invalidated the FCC's interpretation for more precise and provocative reasons: The interpretation failed to contain "limiting standard [s]" and allowed private parties to fix the content of the regulation. Almost sixty-five years ago, the Court struck down provisions of a central piece of New Deal legislation on analogous grounds under the nondelegation doctrine. *Iowa Utilities Board* may be understood to revive the dormant nondelegation doctrine. Although it did not cite *Panama Refining* or *Schechter Poultry* or mention the word "delegation," it undeniably invoked the principles that underlie those cases and are traditionally captured by the concept of delegation: the requirement of limiting standards and the prohibition

New Service

Beginning with this issue of the News, we include summaries of forthcoming articles not yet published in a law review or similar publication. These summaries are based on abstracts provided by the Legal Scholarship Network (LSN), a division of the Social Science Research Network (SSRN). LSN publishes e-mail journals containing abstracts of working papers and recently published papers in over 30 areas of law, including Administrative Law. The Section has arranged with LSN for members to receive a free one-year trial subscription to Administrative Law Abstracts. To subscribe, send an email message to trial@ssrn.com and specify that you are a member of the ABA Section on Administrative Law and Regulatory Practice and that you would like to receive Administrative Law Abstracts. To find out about other LSN journals or to search and download papers from the LSN web site, visit www.ssrn.com.

If a forthcoming article is available in full text on the SSRN web site, the summary indicates the URL for the article; otherwise, the summary indicates the journal in which the article will appear.

on private lawmaking. But it did so in a new way. Instead of striking down the statutory delegation, as it had done in the New Deal cases, the Court upheld the "promiscuous" delegation to the FCC. It then invalidated the FCC's rule for failing to supply the very limiting standards that had once been Congress's responsibility. By requiring the agency to limit its own discretion, *Iowa Utilities Board* may be understood to endorse a persistent undercurrent in administrative law reflected in the D.C. Circuit decision, *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, modified in part and reh'g en banc denied, 195 F.3d 4 (D.C. Cir. 1999), petition for certiorari filed (2000), that is drawing considerable scholarly attention. This Essay argues that *American Trucking* and *Iowa Utilities Board* confirm the emergence of a new delegation doctrine that has the potential to shift the terms of the current debate on delegation and democracy. It fundamentally alters the traditional scope of delegation review by refocusing the inquiry on the exercise of delegated lawmaking authority. By requiring agencies to articulate limiting standards, it reinforces a certain conception of democracy, one that ensures that agencies exercise their delegated authority in a manner that promotes the rule of law, accountability, public responsiveness, and individual liberty.

Frank B. Cross, *Shattering The Fragile Case For Judicial Review Of Rulemaking***, 85 VA. L. REV. 1243 (1999).** This article argues for the abolition of extraconstitutional (e.g., APA) judicial review of administrative rulemaking. It examines the justifications for such review, which are characterized as the rule of law justification, the Marbury justification, the checking justification, the dialogic justification, and the public choice justification. Professor Cross scrutinizes them and finds that they rest on descriptively inaccurate assumptions and are each wanting. He concludes by arguing that judicial review necessarily involves political considerations that are ill-suited for the judiciary. Nor is a judicial review necessary, given the availability of congressional and executive review.

Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking***, SSRN Electronic Library Collection: http://papers.ssrn.com/paper.taf?abstract_id=202808#Paper Download.** Negotiated rulemaking is a process in which representatives of the interests that would be substantially affected by a rule – including the agency responsible for issuing the rule — negotiate in good faith to reach a consensus on a proposed rule. Criticism has recently been leveled at negotiated rulemaking on the ground that it has failed to achieve its "instrumental goals" of saving time and reducing litigation. Professor Cary Coglianese sought to measure whether negotiated rulemaking in fact saved time and reduced litigation by analyzing negotiated rulemaking at EPA, and he found it wanting in both dimensions. Unfortunately, however, Coglianese's research is significantly flawed and hence misleading concerning the actual experience with negotiated rulemaking. Properly understood, negotiated rulemaking has been remarkably successful in fulfilling its promise. In particular, EPA's experience has been that reg neg has cut the time for rulemaking by a third, knocking a full year off the typical schedule. Moreover, no rule that implements a consensus reached by the committee in which the parties agree not to challenge it has ever been the subject of a substantive judicial review — even though they tend to be far more controversial and complex than average rules. And, finally, as described by a serious empirical study, the participants and those otherwise affected by rules find a range of values in negotiated rulemakings as opposed to those developed traditionally.

William S. Jordan III, *Judges, Ideology, and Policy in the Administrative State: Lessons From a Decade of Hard Look Remands of EPA Rules***, SSRN Electronic Library: http://papers.ssrn.com/paper.taf?abstract_id=214 088#Paper Download.** It is often said that the legitimacy of the administrative state depends upon the availability of judicial review of agency action. The legitimacy of judicial review depends, however, upon the proposition that reviewing judges honestly seek to apply neutral legal principles, rather than pursue their own personal ideological agendas. Charges that judicial ideology determines outcomes are not uncommon. This article takes a new empirical approach to examining the effects of political ideology on judicial decisions. Rather than characterizing an entire decision as a win or loss for industrial or environmental interests, this article considers the outcome for each issue decided in each case. The result should be a far more accurate picture of the role of ideology in judicial decisions. Examining all remands of EPA rules by the D.C. Circuit from July 1, 1985 through June 30, 1995, the article concludes generally that the data do not support charges of significant ideological voting in contests between industry and environmentalists. On the other hand, the article

concludes that Democratically appointed judges tended to favor the agency, while Republican appointees tended to favor private actors. On the whole, the article concludes that the data provide "a picture of careful judging, without the strong ideological influences that have been predicted in other studies."

Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, **HASTINGS L. J., Vol. 51, No. 2, April 2000.** This article juxtaposes the recent debates about statutory interpretation and the judicial uses of legislative histories with the relative quiescence over methods for interpreting agency regulations. The latter subject merits more attention than it has received given the relatively greater prevalence and practical import of legislative rules issued by administrative agencies as compared with statutory commands from the legislature. Unlike attempts to understand the legislature's original intent, courts routinely defer to agencies' post-promulgation interpretations of the meaning of their regulations. This grants executive officials unnecessary license for creative reinterpretations of a legislative rule, inviting them to sidestep notice-and-comment rulemaking requirements. The tradition of deference to agency interpretations of ambiguous regulations emerged at a time when courts and litigants had little information that might shed light on original agency intent, but, during the last thirty years, the quantity and accessibility of pre-promulgation materials have exploded. In particular, agencies must issue detailed preambles and regulatory analyses to accompany final rules, and, at earlier stages of the rulemaking process, they may generate various materials that document some of the choices made by regulatory officials. More importantly, these materials pose less of a risk of manipulation than do legislative histories because agencies have a statutory obligation to explain new rules to the public and Congress, and, in the event of a direct challenge, they must defend the validity of their handiwork in the courts. If judges focus on agency preambles and the rest of the administrative record compiled during rulemaking when resolving challenges to the validity of a regulation, then these same materials should provide the best evidence of the agency's original intent when questions about the meaning of such rules later emerge in a variety of contexts. This article concludes that courts should embrace such valuable interpretive materials rather than rushing to defer to the "dynamic" interpretation that an incumbent administration finds most expedient.

David B. Spence and Frank B. Cross, *A Public Choice Case for the Administrative State*, **GEORGETOWN L. J., Forthcoming**. Public choice models have tended to take a dim view of delegation of policymaking authority to administrative agencies, but public choice methods can be used just as easily to construct a normative defense of delegation. The authors offer just such a defense here. They construct a simple formal model posing a hypothetical voter choice: whether to delegate policy decisions to elected politicians or to agencies. They then use the model to (1) suggest reasons why voters might often prefer to delegate policymaking authority to agencies, and (2) address the questions of whether agency policymaking autonomy is desirable, constitutionally valid, and practically workable irrespective of whether voters prefer it. Theirs is essentially a Madisonian argument for deliberative decision-making in the modern administrative state, one that mirrors non-public choice defenses of administrative agencies as loci of deliberation. They thus take a different route to conclusions similar to those reached by Mark Seidenfeld, that "civic republicanism is consistent with broad delegations of political decision making authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators." Their model demonstrates that agency policymaking is often desirable (and often desired by voters) irrespective of the ability of elected politicians to control what agencies do.

David B. Spence and Lekha Gopalakrishnan, *Bargaining Theory and Regulatory Reform: the Political Logic of Inefficient Regulation*, **53 Vanderbilt L. Rev. 599 (2000).** Economists and others have long argued that the American regulatory system is unnecessarily inefficient. Critics charge that the system is both substantively inefficient, in that it sometimes mandates the use of inefficient means for achieving a regulatory goal, and procedurally inefficient, in its over-reliance on rules. These arguments have led to a wave of regulatory reform experiments in the federal bureaucracy, many of which seek to promote positive-sum changes in regulatory policy through bargaining among private- and public-sector stakeholders. As several commentators have noted, most of these regulatory reforms have not met expectations in that bargaining participants often forgo positive-sum changes in the status

continued on page 24

Chair-Elect's Message *continued from page 2*

The group began by reviewing the most notable Section initiatives of the recent past. These include the evolution of our fall meeting into an annual showcase event (the "Administrative Law Conference"); the launching of Developments in Administrative Law and Regulatory Practice, an annual publication prepared by our committees; and our multi-year project to review the Administrative Procedure Act, which should culminate in a "Statement of Administrative Law" and other pronouncements. All of these moves have worked out successfully so far, the group concluded. Discussion thus quickly turned to the question of how we can build on these advances and supplement them with other fruitful innovations.

The advent of a new presidential administration next January was the impetus for a couple of program ideas. A Section task force is already preparing a report to the next administration on our most important recommendations for reform in administrative law areas. A related idea that surfaced during the planning session was that we should produce an orientation program for incoming officials. The program could explain the most important things they need to know about legal constraints on the administrative process if they are to survive and succeed in their new positions. An additional program idea was that the Section should develop a series of educational presentations on the basics of administrative law, aimed at government and private lawyers who are new to the field.

The planning group also reflected on possible new uses of computer technology within the Section. For example, some committees already actively use their e-mail listservs for active discussion of ongoing developments; other committees could follow their lead. Web pages for the APA project or other initiatives could become sites for threaded discussions, i.e., a continuous chain of posted messages, replies, and further replies. CLE programs conducted over the Internet are a reality in other Sections; we have only just begun to experiment with them.

Finally, the group discussed substantive issues that the Section will want to explore in the coming months. Some issues were familiar, such as support for the streamlining of the rulemaking process and the establishment of a successor organization to the Administrative Conference of the United States. Other issues were relatively new to the Section. For instance, what should be the relative roles of traditional regulation, on the one hand, and liability systems such as tort and criminal law, on the other? We have no well defined positions on this theme, but the group was interested in examining it.

These are only a few highlights from a productive session in Williamsburg that no doubt will help to shape our priorities in the near future. But the planning function never really ends. The Section officers welcome ideas for fresh approaches and new initiatives. Please help us maintain the Section's recent record of progress!

Program Notes *continued from page 6*

> mitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes "binding."

In the opinion, Randolph cites an article by George Mason Foundation Professor of Law Robert A. Anthony, titled "Interpretative Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?," published at41 Duke L. J. 1311 (1992). Anthony commented from the audience that Randolph's formulation oversimplifies the treatment of this issue in the article. Strauss likewise expressed his concern over the apparent breadth of the holding.

Eisner concluded the program by thanking the panelists and the audience for their participation. He underscored the need for a continuing dialogue in this area with his remark that the panelists had been given over seventy questions in advance in order to prepare for the session. Seventy, it turns out, was an ambitious undertaking for such a complicated subject on such a beautiful spring day in the Dogwood State.

On Ensuring Agency Accountability in the Information Age

Ever obtain a copy of your credit history from a credit bureau only to find someone else's history intermingled with yours? Or only to find that the note you paid off years ago is listed in arrears?Ever try erasing erroneous information from your record only to face a stone wall with no effective means of review? This, according to a regulated community spokesperson participating in the section's program on "Government Accountability and Information Activities," is what industry experiences when agencies publish erroneous data and issue industry rank-

ings based on bad data or outdated methodologies.

Sidney A. Shapiro, the John M. Rounds Professor of Law at the University of Kansas moderated the panel. Panelists included Jonathan Cannon, Director of the Center for Environmental Studies at the University of Virginia School of Law; Mark Greenwood from the law firm of Ropes & Gray; and Mary L. Lyndon, Professor of Law at St. John's University School of Law.

Greenwood led off by listing the concerns of the regulated. Markets are greatly influenced by information released by the government. The impact is often stronger and swifter than direct regulation. Government in fact consciously uses information disclosure to influence behavior. But this form of regulation generally is not reviewable by the courts because information releases are normally not regarded as final agency actions and agencies are immune from defamation suits under the Federal Tort Claims Act. Hence, when errors are discovered the only recourse is to petition the agency for informal relief. But these entreaties often fall on deaf ears.

Greenwood suggested two possible models for imposing accountability, both depend on access to the courts. The first would permit appellate review under the APA and would employ an "arbitrary and capricious" standard of review. The other model would permit suits against agencies for defamation or dissemination of false and misleading information.

Cannon agrees that agencies must be held accountable. But he does not necessarily agree that judicial involvement is the answer. Cannon framed the issue as whether it was wise to "legalize" information management given the attendant transaction costs this would entail. He noted that other less costly checks on agency abuse already exist. For example, agencies have an interest in maintaining their credibility. Also, agencies are accountable to Congress, the Office of Management and Budget, and the Offices of Inspectors General. Over-deterrence might be just as big a problem.

For Lyndon, the key issues are accuracy and integrity, not process. Judicial review would be overkill, in her opinion. She believes what is really motivating industry on this issue is the dislike of ranking. But ranking is an effective means of making visible the unintended and unwanted byproducts of industrial activity, such as pollution. Lyndon also believes that the purpose of imposing accountability is to prevent government abuses, not enable private actors to escape the consequences of their actions.

Several audience members suggested extending protections under the Privacy Act to cover these types of information releases. Greenwood acknowledged that the idea had some merit insofar as data correction is the concern.

APA Project *continued from page 7*

policy statement and for a companion rule that says the public may rely on such labeled statements unless and until revoked. He also would impose a post-effective comment period on agencies when issuing such pronouncements and allow changes without notice and comment. Strauss advised that any label requirement also should specify what happens if an agency does not attach a label.

Spurious Rules. Professor Robert Anthony, George Mason University School of Law, cautioned that there is a need to distinguish between interpretive rules and policy statements. He also said that courts are putting the cart before the horse when they ask whether a rule that has not passed through notice & comment is a legislative rule. Under the APA, a rule is not legislative if it was not subject to notice & comment. He would classify as "spurious rules" statements that do not interpret, are not used for binding effect, and were not subject to notice & comment.

Skidmore. Professor William Funk of Lewis & Clark Law School would simply give interpretations and policy statements *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (weight of agency's interpretation of statute depends on thoroughness of consideration, validity of reasoning, and consistency with later pronouncements). The interesting issues then become when is review available and what the scope of review should be.

Availability of Judicial Review/Standing

Assistant Reporter Michael Herz, Senior Associate Dean and Professor of Law at the Benjamin N. Cardozo School of Law in New York, acted as moderator of the Availability of Review/Standing panel. Panelists included Harold H. Bruff, Dean of the University of Colorado School of Law, and Cynthia R. Farina, Professor of Law, Cornell University Law School.

Herz observed that the APA is silent on many of the issues in this area and case law inconsistent. He asked the group to consider how much should be codified.

Availability. Bruff led off with a discussion of timing and reviewability. Funk targeted pre-enforcement review of orders (with EPA & OSHA in mind) as deserving of attention. Often, agency orders affect behavior but are not reviewable because they are alleged to not represent final agency action. Asimow urged that such pre-enforcement review should be limited.

Gellhorn stated his belief that pre-enforcement review of rules is highly appropriate when there is a significant impact. Farina pointed out that beneficiaries also have an interest in pre-enforcement review when an agency is guilty of under enforcement.

Lubbers sees a need to regularize *where* review may be obtained. In his opinion, permitting District Court review of NLRB rules has had a chilling effect on the agency's rulemaking activities.

Standing. Farina opened the discussion on standing. She observed that most of the law on standing has developed outside of Congressional edict under the Supreme Court's interpretation of Article III and its self-imposed prudential limitations. She predicted that if the APA's requisites for standing are expanded, the scope of the Court's zone-of-interests test should contract, and vice versa.

After a searching discussion of the contradictions that seem to flow from the Court's various decisions applying the zone-of-interests test, Beerman queried whether the case law on standing was so irreconcilable that tackling this subject was beyond the capability of the Statement.

Farina noted that the zone-of-interests test was meant to be expansive, but now that the "injury in fact" test has developed, a non-APA claimant need only establish injury in fact, but an APA claimant also must pass the zone-of-interests test. This sets up an asymmetrical rule that Farina hopes the Statement would eschew by establishing a default test that is the same for APA claimants and non-APA claimants alike. Congress could still impose asymmetrical schemes on a statute by statute basis.

Supreme Court News *continued from page 9*

compensatory time at a particular time,without any need to include it in the underlying agreement regarding compensatory time.

The Court then went on to address whether the opinion letter was entitled to the particular deference afforded to an agency's interpretations of its own regulations, citing *Auer v. Robbins,* 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). It found that the regulation itself was not ambiguous; it was "plainly permissive." Accordingly, "to defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation."

Justice Scalia took issue with the Court's avoidance of *Chevron* and its reliance on *Skidmore*, although even applying *Chevron*, he concluded the agency's interpretation was unreasonable. He maintained that *Skidmore* is an anachronism, "dating from an era [that is, pre-*Chevron*] in which we declined to give agency interpretations (including interpretive regulations, as opposed to 'legislative rules') authoritative effect." In other words, before *Chevron*, courts did not recognize an agency's interpretation of a statute to be authoritative even when it was contained within a rule that had gone through notice and comment. Rather, courts had insisted that John Marshall's statement in *Marbury v. Madison*, that it is "the province and duty of the judicial department to say what the law is," meant that courts had to exercise independent judgement as to the meaning of statutes. *Chevron* clearly changed this understanding. Moreover, Justice Scalia noted that in a number of cases the Court had invoked *Chevron* and applied its deference to interpretations not contained in agency regulations, including those contained in letters.

The Court's opinion simply ignored Justice Scalia's arguments, but they are worthy of rebuttal, not just a ukase. He is right that the Court has in the past accorded *Chevron* deference in circumstances that would not be allowed under the Court's opinion. *See, e.g., NationsBank of N.C. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-257 (1995)(letter opinion of Comptroller of the Currency); *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 647-648 (1990)(opinion letter); *Young v. Community Nutrition Institute*, 476 U.S. 974, 978- 979 (1986)(Federal Register Notice). In none of these cases, however, did the Court actually address the question whether such types of expression should be accorded *Chevron* deference. And the Court is correct in noting that it has not cited *Chevron* in several cases in which the *Chevron* doctrine would apply if Justice Scalia's analysis were correct. *See, e.g., EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 256-258 (1991)(EEOC guidelines entitled to *Skidmore* deference; *Chevron* not cited; Scalia dissents arguing for *Chevron* deference).

And there are other cases in which the Court's analysis is simply incoherent. *See, e.g., Reno v. Corday*, 515 U.S. 50, 61 (1995)(internal agency guideline is "entitled to some deference ... since it is a permissible construction of the statute," citing *Chevron*); *Martin v. OSHRC*, 499 U.S. 144, 157 (1991)(issuance of a citation is an exercise of delegated lawmaking power entitled to deference, but not citing *Chevron*).

Nevertheless, prior to *Christensen*, there was one line of cases relevant to this issue in which the Court explicitly tied *Chevron* deference to the exercise of delegated legislative power. *See Stinson v. United States*, 508 U.S. 36 (1993)(U.S. Sentencing Commission's "commentary" not entitled to *Chevron* deference because "[c]ommentary, unlike a legislative rule, is not the product of delegated authority for rulemaking"); *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990)("A precondition to deference under *Chevron* is a congressional delegation of administrative authority"); *NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112 (1987)(*Chevron* deference applies only to regulations "promulgated pursuant to congressional authority"). *See also EEOC v. Arabian American Oil Co.* (the Court noted that EEOC did not have rulemaking authority with respect to its guidelines before applying *Skidmore* deference); *Martin v. OSHRC* (the Court distinguished interpretations made in the exercise of delegated lawmaking power from others). Moreover, the analysis in these cases reflected the theory articulated in *Chevron* as the basis for the deference provided there – that ambiguity in a statute was deemed to be an implicit delegation of legislative authority to clarify its meaning made to the agency charged with administering the statute. If the basis for the doctrine was such a deemed, implicit delegation of legislative authority, only an interpretation made in the exercise of an agency's delegated legislative authority, according to the forms required to exercise legislative authority, would receive *Chevron* deference.

In short, the Court's case law was seriously inconsistent, although when the Court actually analyzed what it was doing, it tended to require the exercise of delegated lawmaking power as a precondition to applying *Chevron*. The lower courts reflected the Court's inconsistency.

Christensen (hopefully) ends this debate with a clear majority of the Court rejecting Justice Scalia's theory and embracing the requirement that only the exercise of delegated lawmaking authority triggers the *Chevron* doctrine. There remains the question: what kinds of agency action are deemed to fit that description. The Court gave as examples "formal adjudication" and "notice-and-comment rulemaking," but it did not indicate that these were the exclusive ways agencies might exercise delegated lawmaking authority. And *Christensen* positively cited *Martin v. OSHRC*, which, even if it did not cite *Chevron*, stated that a citation issued by OSHA in an enforcement action constituted the exercise of delegated lawmaking authority. At least, the Court in *Christensen* did explicitly state that opinion letters and interpretations in policy statements, agency manuals, and enforcement guidelines would not qualify for *Chevron* deference.

One possible wrinkle is Justice Breyer's commentary on this issue in a dissent joined by Justices Ginsburg and Stevens, the latter the author of *Chevron*. These justices found the agency's interpretation eminently reasonable and hence entitled to deference under either *Skidmore* or *Chevron*. Justice Breyer's opinion, however, went beyond this conclusion and suggested that Justice Scalia "may well be right" that "an 'authoritative' agency view ... warrants deference under [*Chevron*]." But, he disagreed with Justice Scalia that *Skidmore* deference was an anachronism, articulating what must have been the majority's analysis as well, that *Skidmore* deference was a deference based upon an agency's"specialized experience," whereas *Chevron* deference is based upon a congressional delegation of authority. Finally, Justice Breyer indicated his view, one in tension with a number of Court decisions but consistent with the Court's opinion in *Brown & Williamson*, that a court can find *Chevron* inapplicable because it has doubts that Congress actually intended to delegate interpretive authority to the agency, notwithstanding the presence of statutory ambiguity.

Court Continues its Hostility to Pre-Enforcement Review

Shalala v. Illinois Council on Long Term Care, Inc., 120 S.Ct. 1084 (2000), occasioned an unusual 5-4 split of the Court on an arcane point of the reviewability of Medicare disputes, as well as a lengthy essay by Justice Thomas, dissenting, on the desirability of a presumption in favor of pre-enforcement review.

In *Shalala*, an organization of nursing homes wished to challenge certain regulations and handbooks adopted by the Department of Health and Human Services. It proceeded under the APA, relying upon 28 U.S.C. § 1331 for jurisdiction. However, under § 405(h) of the Social Security Act, "no action … shall be brought under section 1331 … to recover on any claim arising under [the Social

Security Act]." Instead, the Social Security Act provides its own exclusive judicial review provision under 42 U.S.C. § 405(g), which is limited to judicial review of a claim first brought before and denied by the agency. In other words, one affected by newly adopted Social Security regulations cannot simply challenge them under the APA; one must file a claim for benefits, have it denied on the basis of the regulation, and then seek review of that denial, challenging the lawfulness of the regulation. These provisions in turn have been made applicable to the Medicare Act "to the same extent as they are applicable with respect to [the Social Security Act]." 42 U.S.C. § 1395ii.

In two earlier cases, the Court had dealt with cases brought under the APA and 28 U.S.C. § 1331 challenging Medicare determinations. The first, *Heckler v. Ringer*, 466 U.S. 602 (1984), held that the plaintiff was precluded from bringing such a suit because of the provisions in the Social Security Act as applied to the Medicare Act The second, *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667 (1986), distinguished *Ringer* and held that the plaintiffs' suit was not precluded. Lower courts have not uniformly interpreted *Bowen*'s distinction, and the Court granted certiorari in *Shalala* to resolve the differences.

Justice Breyer, writing for the majority, explained that the distinction between *Ringer* and *Bowen* was based upon the fact that in *Bowen*, because of the nature of the plaintiffs' claim, it could never be brought as a claim before the agency, which, if the agency denied it, would then be subject to the Act's special judicial review provision. That is, in *Bowen*, to preclude review under the APA and 28 U.S.C. § 1331 would be to preclude review altogether, whereas in *Ringer* to preclude review under the APA and 28 U.S.C. § 1331 would only mean that Ringer would have to first file a claim and have it denied. Applying this test to the plaintiffs in *Shalala*, he concluded that nothing stopped plaintiffs from first presenting their claim to the agency as a defense to an enforcement action, with the availability of judicial review thereafter. Consequently, the plaintiffs could not bring their action now under the APA and 28 U.S.C. § 1331.

Justice Thomas wrote the main dissent which Justices Stevens and Kennedy joined, and which Justice Scalia joined in part. Justice Thomas read *Ringer* and *Bowen* differently. First, in *Ringer*, Justice Thomas argued, the Court had simply *assumed* that § 1395ii of the Medicare Act adopted totally the preclusion provision of § 405(h) of the Social Security Act, and the Court's analysis exclusively involved § 405(h), not § 1395ii.

In *Bowen*, on the other hand, the Court took pains to note that it was interpreting § 1395ii, the Medicare provision, and in Justice Thomas's view the Court in *Bowen* held that § 1395ii only imported § 405(h)'s preclusion with respect to "amount determinations" and did not preclude suits that challenge the validity of the agency's regulations and instructions. Under Justice Thomas's interpretation of *Bowen*, *Ringer* was wrongly decided, but the error was not in what it said—its interpretation of § 405(h)—but in what it did not address—the meaning of § 1395ii.

On the merits, Justice Breyer's reading of *Bowen* is more convincing, but this is "inside baseball" for cognoscenti of Medicare provider litigation. Of more note to administrative lawyers generally was the majority's and dissent's attitudes toward pre-enforcement review generally.

The majority's analysis included references to the doctrines of ripeness and exhaustion. The majority noted that the baseline for judicial review is § 405(h) of the Medicare Act went

> beyond ordinary administrative law principles of "ripeness" and "exhaustion of administrative remedies," doctrines that in any event normally require channelling a legal challenge through the agency. [citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-149 (1967)] Doctrines of "ripeness" and "exhaustion" contain exceptions, however, which exceptions permit early review when, for example, the legal question is "fit" for resolution and delay means hardship.

The baseline for judicial review is as a defense against agency enforcement. Only in certain "exceptional" circumstances is judicial review available pre-enforcement.

In other words, the baseline for judicial review of agency action is in the context of a defense against agency enforcement. Only in certain "exceptional" circumstances is judicial review available pre-enforcement.

According to Justice Thomas dissenting, however, joined by Justices Kennedy and Stevens, there is a presumption of judicial review of final agency action, or in other words a presumption of pre-enforcement judicial review. This was important to Justice Thomas's analysis of the purported preclusion provision, because any doubt as to the preclusion provision should be resolved in favor of review, given the presumption.

Justice Scalia, who joined Justice Thomas in dissent, did not agree with his discussion to the

extent that it said there was a *presumption* in favor of pre-enforcement review, "since that suggests that some unusually clear statement is required by way of negation." Rather, he said, there is a presumption of review *sometime*. In his view, "preenforcement review is better described as the background rule, which can be displaced by any reasonable implication from the statute."

Each of the opinions cited *Abbott Laboratories* to support its characterization of pre-enforcement review, but it is clear (to this observer) that Justice Thomas is closest to the mark. In *Abbott Laboratories*, drug manufacturers were challenging an FDA rule requiring certain types of labels for prescription drugs. The Court said:

> The first question we consider is whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner. The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress. Early cases in which this type [that is, pre-enforcement] judicial review was entertained have been reinforced by the enactment of the Administrative Procedure Act, which embodies the *basic presumption* of judicial review to one "suffering legal wrong because of agency action or adversely affected or aggrieved by agency action within the meaning of a relevant statute.".

(emphasis supplied; citations omitted)This language clearly supports Justice Thomas's view of pre-enforcement review. But *Abbott Laboratories* does contain a second part. There the Court says:

> A further inquiry must, however, be made. The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy "ripe" for judicial resolution.

This language is more supportive of the majority's characterization of pre-enforcement review. Professor Duffy, however, in his award winning article, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113 (1998), argues that this judge-made "ripeness" doctrine was overruled by the text of the APA. But one need not go so far to still take issue with the majority in *Shalala*, for the Court in *Abbott Laboratories* concluded its further inquiry with the following:

> Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance.

Abbott Laboratories, of course, is not the latest of the Supreme Court's pronouncements on pre-enforcement review, *see especially Ohio Forestry Association, Inc. v. Sierra Club*, 118 S.Ct. 1665 (1998) and *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), which have been less supportive of pre-enforcement review, but it remains the defining case which all subsequent cases invoke and purport to apply. Whether these later cases, including *Shalala*, invoke it faithfully is another question.

Upcoming Meetings

2000 ABA/Section Annual Meeting
Essex House
New York, New York
July 6 – 9, 2000

St. James Court Hotel
London, England
July 15 – 20, 2000

2000 Administrative Law Conference
Westin Fairfax Hotel (formerly the Ritz Carlton)
Washington, DC
October 12 – 14, 2000

2001 ABA/Section MidYear Meeting
Hilton at Mission Bay
San Diego, CA
February 15-18, 2001

2001 Section Spring Meeting
Sundial Beach Resort
Sanibel Island, FL
April 26-29, 2001

2001 ABA/Section Annual Meeting
The Drake Hotel
Chicago, IL
August 2-5, 2001

News from the Circuits

Purported Guidance Document an Improperly Issued Legislative Rule

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

The first issue was whether the guidance document was reviewable at all. EPA maintained that it was not a "final" agency action, because it had no binding effect on anyone. The court noted that only legislative rules can have legally binding effect but that other kinds of documents "can, as a practical matter, have a binding effect."

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

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

Eighth Circuit Holds Service Did Not Apply Relevant Statutory Authority After Park Service Official Expresses Contempt for Statutory Language

Under the Wild and Scenic Rivers Act Congress designates rivers for protection under that Act because of their "outstandingly remarkable" values. A statutory designation carries with it a provisional boundary for the area to be protected, but the Secretary of Interior is to select detailed final boundaries, totaling no more than 320 acres per river mile. The Secretary has delegated his authority to the Park Service, which in 1992 began a study for the boundaries of the newly designated Niobrara River in Nebraska. In 1996 the Service adopted final boundaries after a "thorough and lengthy" decision-making process, but in 1997 it was sued on the basis that it had not used the correct legal standard in setting the boundaries.

Throughout the planning process Service employees had sought to determine the "significant" and "important" resources along the river in order to include them within the boundaries. When a public participant in the process complained that the statute referred to "outstandingly remarkable," not simply "significant" and "important," he was met with two responses. One was a statement by the official in charge of the planning process that "there's nothing special or magic about those two words ["outstandingly remarkable']. It's just something that got put in an act of Congress, and probably by kind of a committee process, it's terrible prose, it obscures communication (sic)." The other was a statement that "significant" and "important" meant the same thing as "outstandingly remarkable." Thereafter, the agency lawyers tried to patch things up by eliminating all references in the final documents to "significant" and "important," inserting instead "outstandingly remarkable."

In *Sokol v. Kennedy*, — F.3d — (8th Cir. 2000), the court took umbrage at the official's attitude toward statutory language. Perhaps influenced by that intemperate and in-hindsight ill-advised language, the court found that "significant' and "important" did not mean the same thing as "outstandingly remarkable," and it was clear that the Service had used the "significant" and "important" resources standard because that is the standard applicable to boundaries for national parks. Moreover, the court also found that despite the substitution of the proper

terms in the final documents, there was no substantive change in the analysis, all of which was performed using the "significant" and "important" language. Accordingly, it reversed and remanded the case to the Service to select boundaries based on the need to protect "the outstandingly remarkable values of the Niobrara Scenic River Area."

"Particular Matter" in Conflict-of-Interest Statute Read Narrowly by D.C. Circuit to Avoid Constitutional Question

A GS-13 electrical engineer in the Office of Research and Development in the Characterization Research Division of the National Exposure Research Laboratory within the Environmental Protection Agency has been an active volunteer member of several state and local environmental groups in Las Vegas, Nevada, where he lives. As such, he often commented on behalf of those groups with respect to environmental studies concerning federal land use actions affecting the local environment. EPA, however, maintained that when he made these comments he was violating 18 U.S.C § 205, which provides civil and criminal penalties for a federal employee who "acts as an agent or attorney for anyone before any department [or] agency ... in connection with any covered matter in which the United States is a party or has a direct and substantial interest." "Covered matter" is then defined as "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or *other particular matter*." (emphasis supplied).

In *Van Ee v. EPA*, 202 F.3d 296 (D.C. Cir. 2000), the court held that § 205 did not apply to the employee's activities. The court noted that both the Office of Government Ethics and the Office of Legal Counsel in the Department of Justice had opined that §205 does not reach "representation ... made in connection with a broad policy matter that is directed to the interests of a large and diverse group of persons rather than one that is focused on the interest of a discrete and identifiable class." This accorded with the court's interpretation of the language and history of the provision. Nevertheless, this interpretation did not totally resolve the issue, because EPA had accepted this formulation and yet said the employee might violate the statute when commenting on BLM management of lands in southern Nevada by focusing on specific parcels of land and on the siting of power lines by two specific utilities. The court, however, noting that this was a criminal statute and one that raised a serious question about its constitutional application to a federal employee's comments to an agency on a matter of public importance, interpreted the statute narrowly. EPA's error, it said, was to focus on what the employee might comment on, rather than on the nature of the government action.

> [W]hether an administrative proceeding is a 'particular matter' under § 205 is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties are the concerns animating § 205 implicated. [Section] 205 is properly understood to apply to those matters in which a federal employee's representational assistance could potentially distort the government's process for making a decision to confer a benefit, impose a sanction, or otherwise to directly effect (sic) the interests of discrete and identifiable persons or parties. As a result, § 205 leaves career federal civil servants free to voice the concerns of citizens' groups of which they are members on broad policy issues because the likelihood that such representational assistance could divide the loyalty of the employee or distort the decisionmaking process is minimal.

DOT's Refusal to Grant Waiver to Multiply Handicapped Driver Arbitrary and Capricious

In *Parker v. U.S. Dept. of Transportation*, 207 F.3d 359 (6th Cir. 2000), DOT had denied a waiver from its vision rules for commercial vehicle drivers in interstate commerce because in addition to having monocular vision the driver was missing one arm. The statute authorizing the waiver requires the DOT to find that granting the waiver will provide at least an equivalent level of safety. DOT said it could not make that finding because it had no experience with visually impaired drivers with multiple disabilities. The Sixth Circuit reversed, saying that DOT's decision was arbitrary and capricious because it had not made an individualized determination, as required by the statute, but had effectively made a blanket rule of disapproval. The failure of DOT to consider the driver's 1.2 million miles of incident-free driving in intra-state commerce and its failure to consider giving him a driving test were arbitrary and capricious.

News from the States *continued from page 11*

the General Assembly explicitly delegated such power in general law.The proposed amendment seems also to reserve to the legislature any balancing of the rights of hunters and property owners.

Virginia on the Web[3]

Recently the state of Virginia launched a regulatory participation web site, the "Virginia Regulatory Town Hall" (www.townhall.state.va.us). This site provides the public with detailed information throughout each phase of the regulatory development process in Virginia. It has a regulatory calendar that allows users to quickly find meetings associated with regulations they are tracking. It also has an e-mail notification service that notifies users about upcoming meetings, regulatory actions, etc, in the subject area that the user has specified. In addition, the Town Hall operates an intranet that allows for more efficient internal processing of regulations. Anyone who has questions should contact Jay Lagarde at slagarde@dbp.state.va.us or by phone at (804) 786-8856.

[3] The information in this article was provided by Jay Lagarde, Senior Analyst, Virginia Department of Planning and Budget.

State Administrative Law Articles

Jim Rossi, *ALJ Final Orders on Appeal: Balancing Independence With Accountability***, Journal of the National Association of Administrative Law Judges, Vol. 19, Fall 1999.** This essay addresses how ALJ final order authority in many state systems of administrative governance (among them Florida, Louisiana, Missouri, and South Carolina) poses a tension between independence and accountability. It is argued that political accountability is sacrificed where reviewing courts defer to ALJ final orders on issues of law and policy. Standards of review provide state courts with a way of restoring the balance between independence and accountability, but reviewing courts should heighten the deference they give to the agency's legal and policy positions — giving little or no deference to the ALJ on these issues — even where the ALJ's decision had final status.

Nominations 2000 *continued from page 3*

Lisa A. Whitney (New York, NY) – corporate practice with Borghese, Inc. Lisa is Chair of the Corporate Counsel Committee and Section liaison to the ABA Business Law Section.

Renee M. Landers (Boston, MA) – private practice with the law firm of Ropes & Gray. Renee is Co-Chair of the Health and Human Service Committee and Section liaison to the ABA Health Law Section.

Section Delegates:
Ernest Gellhorn (Washington, DC) – George Mason University Foundation Professor of Law. This will be a second three-year term as Section Delegate. He is a former Section Chair and is a Reporter for the Section's Administrative Procedure Act Project.

Ronald A. Cass (Boston, MA) – Dean, Boston University School of Law. Ron is the Immediate Past Chair of the Section and Chairs the Advisory Board of the Section's Administrative Procedure Act Project. The vacancy for this position was created by theresignation of Theodore B. Olson due to upcoming business commitments during the time of the ABA Annual and Midyear Meetings and appointment will be for the remainder of the unexpired term.

The following have been recommended to the Chair of the Section for appointment to special seats on the Council:

State Administrative Law
Jim Rossi (Tallahassee, FL) – Professor of Law at Florida State University College of Law.

Executive Branch
Daniel Marcus (Washington, DC) – Associate Attorney General, U.S. Department of Justice.

Judiciary
Merrick Garland (Washington, DC) – Judge, U.S. Court of Appeals for DC Circuit.

Legislative Branch
James Ziglar (Washington, DC) - Senate Sergeant of Arms.

Administrative Judiciary
Judith Ann Dowd (Washington, DC) – Administrative Law Judge at the Federal Energy Regulatory Commission.

Officers, Council and Committee Chairs

Chair
John Hardin Young
Falls Church, VA
703/575-5546

Chair-Elect
Ronald M. Levin
St. Louis, MO
314/935-6490

Vice Chair
C. Boyden Gray
Washington, DC
202/663-6000

Secretary
Cynthia A. Drew
Washington, DC
202/616-7554

Budget Officer
Leonard A. Leo
Washington, DC
202/822-8138

Asst Budget Officer
Kathleen A. Buck
Washington, DC
202/879-5060

Section Delegates
Ernest Gellhorn
Washington, DC
202/319-7104

Theodore B. Olson
Washington, DC
202/955-8668

Last Retiring Chair
Ronald A. Cass
Boston, MA
617/353-3112

Council
Michael J. Astrue
Belmont, MA
617/484-6166

Phyllis E. Bernard
Oklahoma City, OK
405/521-5181

Harold H. Bruff
Boulder, CO
303/492-3084

Steve Calkins
Detroit, MI
313/577-3945

H. Russell Frisby, Jr.
Washington, DC
202/296-6650

Judith S. Kaleta
Washington, DC
202/493-0992

Eleanor D. Kinney
Indianapolis, IN
317/274-4091

Randolph J. May
Washington, DC
202/289-8928

Daniel R. Ortiz
Charlottesville, VA
804/924-3127

Daniel Rodriguez
San Diego, CA
619/260-4527

Daniel E. Troy
Washington, DC
202/719-7550

Lynne K. Zusman
Washington, DC
202/659-1971

Ex Officio Members
State Administrative Law
David E. Cardwell
Orlando, FL
407/244-5112

Executive Branch
Daniel Marcus
Washington, DC
202/514-9500

Judiciary
Stephen F. Williams
Washington, DC
202/216-7210

Legislative Branch
James W. Ziglar
Washington, DC
202/224-2341

Administrative Judiciary
Judith Ann Dowd
Washington, DC
202/219-2557

Administrative Process Committee Chairs

Adjudication
Alan W. Heifetz
Washington, DC
202/708-5004

John C. Keeney, Jr.
Washington, DC
202/637-5750

Constitutional Law and Separation of Powers
David Frederick
Washington, DC
202/514-1030

Barbara K. Olson
Washington, DC
202/661-6366

Corporate Counsel
Lisa A. Whitney
New York, NY
212/659-5306

Dispute Resolution
Charles E. Pou
Washington, DC
202/887-1037

Judicial Review
Richard L. Revesz
New York, NY
212/998-6185

Legislative Process and Lobbying
Trevor Potter
Washington, DC
202/719-4273

Ratemaking
Paul F. Forshay
Washington, DC
202/383-0708

Regulatory Initiatives
Jonathan J. Rusch
Washington, DC
202/514-0631

Sidney A. Shapiro
Lawrence, KS
785/864-9222

Rulemaking
Peter L. Strauss
New York, NY
212/854-2370

State Administrative Law
Michael R. Asimow
Los Angeles, CA
310/825-1086

Jim Rossi
Tallahassee, FL
850/644-8308

Edward J. Schoenbaum, Jr.
Springfield, IL
217/524-7836

Government Functions Committees

Agriculture
Robert G. Hibbert
Washington, DC
202/756-8216

Antitrust and Trade Regulation
William H. Page
Jackson, MS
601/925-7143

Banking and Financial Services
Anne E. Dewey
Washington, DC
202/414-3803

David W. Roderer
Washington, DC
202/974-1012

Benefits
Jodi B. Levine
Oklahoma City, OK
405/231-4451

Beverage Alcohol Practice
Richard M. Blau
Tampa, FL
813/227-6775

Communications
Peter D. Ross
Washington, DC
202/719-4232

Consumer Products Regulation
David H. Baker
Washington, DC
202/973-2709

Peter L. Winik
Washington, DC
202/637-2224

Criminal Process
David L. Douglass
Washington, DC
202/778-3026

Stephen M. Ryan
Washington, DC
202/463-4349

Defense and National Security
Thomas E. Crocker, Jr.
Washington, DC
202/756-3318

Education
Ina B. Leonard
Birmingham, AL
205/934-3474

George B. Shepherd
Atlanta, GA
404/727-6978

Elections
Carol A. Laham
Washington, DC
202/719-7301

Jay B. Myerson
Reston, VA
703/715-9600

Jamin B. Raskin
Washington, DC
202/274-4011

Energy
Kenneth G. Hurwitz
Washington, DC
202/962-4850

Richard J. Pierce, Jr.
Washington, DC
202/994-1549

W. Bland Williamson
Tulsa, OK
918/581-5500

Environmental and Natural Resources
James O. Neet, Jr.
Kansas City, MO
816/474-6550

Wendy Wagner
Cleveland, OH
216/368-3303

Food and Drug
Nick Littlefield
Boston, MA
617/832-1105

Government Operations & Personnel
Joel P. Bennett
Washington, DC
202/625-1970

Health and Human Service
David V. Foster
Washington, DC
202/434-7413

Darrel J. Grinstead
Washington, DC
202/637-5600

Renee M. Landers
Boston, MA
617/951-7000

Housing and Urban Development
Otto J. Hetzel
Bethesda, MD
202/321-1500

Immigration and Naturalization
Anna W. Shavers
Lincoln, NE
402/472-2194

Insurance
Janet E. Belkin
New York, NY
212/815-9267

Intellectual Property
Jonathan Band
Washington, DC
202/887-1555

International Law
Alan C. Raul
Washington, DC
202/736-8477

James C. Stearns
Washington, DC
202/778-3000

International Trade & Customs
Lindsay Meyer
Washington, DC
202/962-4800

Labor & Employment Law
Nancy E. Shallow
Detroit, MI
313/877-7337

Ombudsman
Sharan Lee Levine
Kalamazoo, MI
616/382-0444

Postal Matters
William B. Baker
Washington, DC
202/719-7255

Public Contracts and Procurement
Charles D. Ablard
Washington, DC
202/789-8787

Kathleen A. Buck
Washington, DC
202/879-5060

Securities, Commodities and Exchanges
Timothy R. Donovan
Chicago, IL
312/923-2871

Alan L. Dye
Washington, DC
202/637-5737

Transportation
William S. Morrow, Jr.
Washington, DC
202/331-1671

Treasury, Revenue and Tax
James R. Hagerty
Washington, DC
202/778-3037

Veterans Affairs
Michael P. Horan
Washington, DC
202/416-7792

James W. Stewart
Washington, DC
202/554-3501

Barton F. Stichman
Washington, DC
202/265-8305

Member News

Although **Gary Edles** now spends most of the year in England, he recently contributed an article entitled"The Almost Accidental Start of a New Federal Agency" for the January 2000 issue of The Federal Lawyer, the monthly publication of the Federal Bar Association. The article discusses the emergence of a new multi-member independent agency.

News that you think should be shared with the Section should be sent to: Professor William Funk, Lewis & Clark Law School, Portland, OR 97219; FAX (503) 768-6671; E-mail: funk@lclark.edu. Items should be received not later than August 4.

Recent Articles of Interest

continued from page 13

quo. Those same commentators have offered a variety of explanations for these failures, most of which these authors argue are unpersuasive or incomplete. They propose another explanation drawn from the standard bargaining literature in economics, one that seems to explain the trajectory of recent regulatory reforms. They argue that in the context of political conflict over policy changes, participants in these bargaining processes view positive-sum policy changes in zero-sum terms. That is, they bargain strategically, using their power to veto these positive-sum changes in order to extract further policy concessions from other stakeholders. This revelation has important implications for the future of this kind of regulatory reform.

ADMINISTRATIVE & REGULATORY LAW NEWS

Volume 25, Number 4, Summer 2000

Published by the Section of
Administrative Law and Regulatory Practice
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611-4497

ABA Defending Liberty Pursuing Justice

Nonprofit Org.
U.S. Postage
PAID
American Bar
Association
61025