



## Administrative Common Law and the Original Meaning of Judicial Review Under the APA

by John Duffy\*



Section Chair Jack Young and Scholarship Committee Chair Daniel Ortiz present the Annual Scholarship Award to Professor John Duffy

In 1946 Congress enacted a “comprehensive statement of the right, mechanics, and scope of judicial review.”<sup>1</sup> Section 10 of the Administrative Procedure Act was intended to prescribe “when there may be judicial review and how far the court may go in examining into a given case,” and the courts were supposed to “prevent avoidance of the requirements of the [Act] by any manner or form of indirection.”

That was the ambition of the 79th Congress, but the reality has quite been different. Decades after the enactment of the APA, Professor Kenneth Culp Davis accurately observed: “Perhaps about nine-

\* Professor of Law, Benjamin Cardozo School of Law of Yeshiva University; Winner of the 1999 Scholarship Award. This shortened version of Professor Duffy’s law review article, *Administrative Common Law in Judicial Review*, 77 *Tex. L. Rev.* 113 (1998), which won the Scholarship Award, originally appeared in *Administrative Law & Regulation*, the newsletter of the Administrative Law & Regulation E.L. Weigand Practice Group of the Federalist Society.

<sup>1</sup> Staff of Senate Comm. on the Judiciary, *Legislative History of The Administrative Procedure Act*, S. Doc. No. 79-248, at 368 (1946) (statement of Rep. Walter).

tenths of American administrative law is judge-made law . . . . Most of it is common law in every sense, that is, it is law made by judges in absence of relevant constitutional or statutory provision.” Common law has been particularly prevalent in judicial review, an area that Professor Louis Jaffe described in 1965 (again, quite accurately) as encompassing “a whole congeries of judicial theories and practices,” which constitutes “the common law of review, and which is a significant part of the ‘administrative law’ of the jurisdiction.”

A perfect example of the conflict between the APA and administrative common law is provided by *Darby v. Cisneros*, 509 U.S. 137 (1993). *Darby* involved a simple issue: whether a party aggrieved by administrative action must, prior to seeking judicial review, exhaust all administrative appeals. The APA provides that intra-agency appeals do not have to be pursued unless the agency requires the

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# Chair's Message

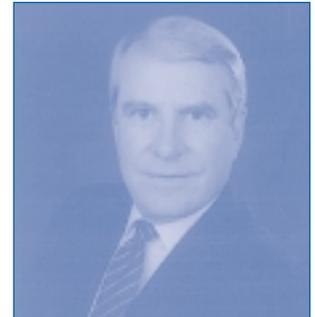
As a section of committees, the fall Administrative Law Conference is representative of the Section of Administrative Law and Regulatory Practice's work and scope. A brief summary of that work follows.

First, the committees of Dispute Resolution, Banking and Financial Services, Health and Human Services, Criminal Process, Communications, Election Law, and Regulatory Initiatives held substantive programs, which included: "Is Government ADR Really Confidential?" Financial Privacy: Emerging Public Policies and Protections," "The Medicare Drug Benefit," "Legal Issues Related to Prisoners Working and Competing with the Private Sector" "Independent of Whom? Congressional and Administration Influence Over the Independent Agency - Reviewing the FCC Experience," "Redistricting: Pushing the Limits," and "The 'New' Regulatory Flexibility Act: Judicial Review, Agency Practice and Public Policy." The Administrative Procedure Act project, moreover, held another of its planning sessions and again sought Section and outside reaction. Over four hundred people participated in the Administrative Law Conference. Highlights of the meeting and the Section's dinner are described elsewhere in this newsletter.

Second, the Council (the ultimate section committee) turned its attention to several substantive issues. The Council considered recommendations relating to the Uniform Mediation Act, Revision to the Code of Ethics for Commercial Arbitrators, veterans appeals, and agency internet sites.

The Council also held an informative and lively debate on the proposed Federalism Accountability Act (Act). While the Council has not come to any conclusion on the Act, issues of federalism are of utmost importance to the Section and to the functioning of government. These issues include preemption under the Act and the advisability of requiring agency federalism assessments. An overarching issue in this debate is whether "federalism assessments" should be included in a comprehensive effort to rationalize and consolidate current requirements for agency rule making.

Finally, the Section is continuing its publication efforts as a service to its members and to administrative law scholarship. By the end of 1999, the Section will have in publication Professor Breger, Mr. Schatz, and Ms. Lauffer's *Federal Administrative Dispute Resolution Deskbook for Practitioners*, Professors Funk and Lubbers and Mr. Pou's *Federal Administrative Procedure Sourcebook*, and the committees' *Administrative Law Developments*, edited by Professor Lubbers. The Section is well poised to begin the publication of monographs and other shorter works of practical and academic intent.



John Hardin Young

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# Congressmen Call for Change in Prison-Goods Competition

by William S. Morrow, Jr.\*



Senator Carl Levin



Representative Bill McCollum



Representative Peter Hoekstra

Three members of Congress — Senator Carl Levin and Representatives Peter Hoekstra and Bill McCollum — helped kick off the 1999 Administrative Law Conference with a spirited discussion on the policies and legal issues relating to competition between federal prison labor and the private sector. All three agreed the time has come for change.

A controversial federal statute, 18 U.S.C. § 4122, gives Federal Prison Industries, Inc., (FPI) — a federal corporation created in 1934 to train and employ federal inmates — the right to compete with the private sector by “taking” sales to federal agencies of commodities it makes. The statute, in essence, grants FPI a right of first refusal for agency sales of any product FPI makes. A recent controversial DOJ opinion would permit FPI to expand its sales of services to non-government purchasers, as well.

Sen. Levin urged that prison labor be required to compete on a more level playing field. He pointed out that a GAO study shows as much as 20 percent of agency purchases from FPI actually could be made more cheaply from private vendors. Levin also pointed out that a joint FPI/Department of Defense study reveals a high rate of agency dissatisfaction with FPI goods.

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

For Rep. McCollum, “The issue is rehabilitation.” According to McCollum, “Those who engage in prison industries labor do better than those who do not, once released.” On the other hand, McCollum agrees the current system is “biased and unfair.” He would do away with the current preference for agency purchases from prison labor, but only if: (1) management of prison labor is privatized; (2) prisoners are paid minimum wage; and (3) sales are permitted on the open market.

Congressman Hoekstra likewise argued for a comprehensive overhaul. “This 1930s law has become barnacled with administrative and judicial interpretation,” said Hoekstra. But he disagrees that privatization is the answer, cautioning that the impact of such a move is currently unknown. The U.S. Chamber of Commerce and other industry groups are supportive of Levin and Hoekstra.

The entire program was moderated by Stephen M. Ryan, Co-Chair, Criminal Process Committee, and Partner, Manatt, Phelps & Phillips. The program also included a panel discussion among representatives of FPI, the Prison Guards Union and Correctional Vendors Association who favor the current program, as well as representatives from the U.S. Chamber of Commerce, UNITE, and others who are concerned with prison competition. This issue and the administrative law issues related to it will be a central focus of the criminal process committee’s work in the next year. ◆

Photos in this issue by Warren Morrow, unless otherwise noted.

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# 1999 Administrative Law Conference Showcases Section Talent

## Anchor Programs Pack Room

by William S. Morrow, Jr.\*



Administrative Law Conference Annual Developments Panel. From L to R: Jeff Lubbers, David Frederick, Michael Herz, Mark Seidenfeld, and Stephen Calkins

Attendees at the 1999 Administrative Law Conference, held at the St. Regis Hotel in Washington, DC, October 14-16, showed renewed interest in the field of law Justice Scalia has declared “not for sissies” by turning out in large numbers for the Section’s expanded offering of 10 programs, 2 receptions, an awards luncheon honoring significant contributions to the study and practice of Administrative Law, and a dinner honoring past Attorneys General and other administrative law dignitaries.

The anchor programs — the “Annual Review of Developments in Administrative Law” and “Project to Review the Administrative Procedure Act” — filled the St. Regis Crystal Ballroom to near capacity.

### Annual Developments

Jeff Lubbers, fellow in Law & Government, Washington College of Law, American University, and author, *GUIDE TO FEDERAL AGENCY RULEMAKING* (3rd ed.), headed the Annual Developments panel.

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

According to Lubbers, the 1998-1999 period was not dramatic but merely “sets the stage” for the upcoming year. He noted Judge Posner’s opinion in *Peabody Coal* that the Federal Rules of Evidence do not apply to administrative proceedings but believes Posner’s view is not widely held. Lubbers also noted several trends, including the use of non-ALJs in agency adjudications, agency use of the inter-

net as a platform for rulemaking, and an increasing number of remands for proper regulatory flexibility analysis. He then turned the podium over to the panelists who spoke on the following topics.

**Adjudication:** Professor Stephen Calkins of Wayne State University Law School addressed developments in agency adjudication. Calkins brought attention to the 6th Circuit’s decision in *Tri-State Steel*, allowing recovery of fees under the Equal Access to Justice Act by a corporate subsidiary even though the parent would not have qualified. Calkins highlighted two other decisions, as well: the 7th Circuit’s decision in *Podio v. INS*, holding that the barring of potentially corroborating testimony violated due process; and the 8th Circuit’s decision in *Morrison v. Apfel*, holding that the judge’s failure to discuss disability findings by other agencies was reversible error in a denial of Social Security benefits.

**Rulemaking:** Professor Mark Seidenfeld of Florida State University College of Law discussed rulemaking developments. Seidenfeld described the past year as “slow but steady,” with no major legislation. He focussed his remarks primarily on the 3rd Circuit’s dicta in *Caruso v. Blockbuster*, and the DC Circuit’s holding in *Alaska Professional Hunters*, which declare

that an agency may not change an interpretive rule construing an agency regulation by issuing a subsequent interpretive rule but, rather, must rely on notice and comment rulemaking.

**Judicial Review:** Professor Michael Herz of Benjamin N. Cardozo School of Law expressed his opinion that the bench's "increasing impatience with agencies and litigants" is yielding stricter ripeness and standing rules. He told the audience that *Chevron* is still "extraordinarily important," witness the Supreme Court's holding in *U.S. v. Haggar*, that *Chevron* applies to the Court of International Trade in cases involving Customs Service regulations. Herz found nothing in the past year's decisions, however, that he would call "transformative."

**Separation of Powers:** David Frederick, Asst. Solicitor General in the U.S. Dept. of Justice, briefed the audience on separation of powers developments. Frederick spent much of his time discussing the revival of the delegation doctrine by the DC Circuit



Jack Young introduces APA Project Panel. From L to R: Paul Verkuil, William Funk, Ron Levin, Ernest Gellhorn, Richard Revesz

in *American Trucking Ass'n v. EPA*. The Court struck down EPA's ambient air quality standards on the ground that they proceeded from agency constructions of the Clean Air Act that was so loose "as to render them unconstitutional delegations of legislative power." Frederick called the Court wrong in focusing on the agency's construction instead of the language of the statute, which may explain why the Court did not cite any delegation precedent.

### APA Project

Paul Verkuil, chief reporter for the project and dean of the Benjamin N. Cardozo School of Law, moderated the APA Project panel, which explored the topics of judicial review and governmental management.

Ron Levin, Chair-Elect of the Section and a professor at the Washington University School of Law, opened with a brief history of the Section's earlier effort at a statement on judicial review, which culminated in 1986 with the Section approving a document titled: "A Restatement of Scope-of-Review Doctrine." The statement, along with commentary prepared by Professor Levin, can be found at 38 *Administrative Law Review* 235. It can also be found without the commentary at the section's webpage at [www.abanet.org/adminlaw/apa/home.html](http://www.abanet.org/adminlaw/apa/home.html). Levin used his time to explain how the 1986 statement could be reworked to account for *Chevron*.

Professor Richard Revesz of New York University School of Law commented that the judicial review group would begin their work with the idea that except for *Chevron* and the presumption of validity the law has not changed much since 1986. He believes one hurdle for the group will be explaining how courts discern what clear intent

is. Professor Ernie Gellhorn of George Mason University School of Law noted that *Chevron* is the most cited case in American history. It appears to him, however, that *Chevron* seems not to be cited when the court finds clear intent in the language of the statute and thus does not get past step 1. He believes the group's work product must address review of policy changes based on differences in facts.

Professor Bill Funk of Lewis & Clark Law School discussed the topic of government management. His presented an outline created with his co-reporter, Cass Sunstein of the University of Chicago Law School, which can be viewed at the section's webpage. (See above). Many of the proposed recommendations about which they sought input were highly controversial, and former Chair Ron Cass and Vice-Chair C. Boyden Gray both recommended that Funk and Sunstein focus on reporting what is currently the practice.

Additional panels will be convened at future section meetings. Persons interested in contributing should contact section staff and/or visit the section's web page. ▲

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# Council Capsules

## A Brief Digest of Council Highlights From the 1999 Administrative Law Conference



Neil Eisner and Jack Young present the Mary C. Lawton Award for Outstanding Government Service to Joyce Martin, Executive Director of Environment/Energy to the Governor of Indiana as well as the Deputy Counsel to the Governor

### Section Publications Generating Revenue.

Council member Randy May reported that sales of *The Lobbying Manual* and *A Guide to Federal Agency Rule-making* have done well, producing a \$22,000 net profit by August 1999. May also reported that the Section has two other books in progress. The first, *ADR in Federal Agencies*, has gone to ABA Publishing and will be ready for distribution in early 2000. The *Federal Administrative Procedure Source Book* should be ready to go to ABA Publishing by the end of the year. May further noted that the Publications Committee is exploring the use of a uniform publications design to enhance Section identity and improve publications marketability. May concluded with the observation that the *Administrative Law Review* is beginning to receive a surplus of articles and that these articles might be developed into a series of monographs or practice guides.

**Law Review Leapfrogs Competition.** Editor-in-chief Stacey King reported that the Section-sponsored *Administrative Law Review* now has the largest paid circulation of any student-edited law review in the United States, and *Florida State University Law Review* has ranked it 9<sup>th</sup> among specialty law reviews in the nation. Future issues will focus on immigration, regulation of politics, privatization, and deregulation of telecommunications.

**First Administrative Law Developments Issue to be Offered Free.** By a close 9 to 8 Council vote, the first issue of *Administrative Law Developments* — a collection of 1998-1999 administrative law highlights assembled by the Section's committees and edited by Jeff Lubbers — will be distributed free of charge to Section members and made available to non-Section members through the ABA's publications package plan. Budget officer Leonard Leo noted that the publications committee had proposed two other options, as well: (1) selling the book via a two-tiered system whereby Section members pay a lower price than non-Section members; and (2) funding distribution of the book out of Section profits.

**Council Gives Harter Go-Ahead on Uniform Mediation Act Comments.** Past Section Chair Philip Harter appeared before the Council to discuss a draft letter that will serve as the Section's comments on the latest draft of the Uniform Mediation Act. The Act is the product of a joint effort by the National Conference of Commissioners on Uniform State Laws and the ABA's Section of Dispute Resolution to develop a model statute that will serve as a common blueprint for the States. The comment letter focuses primarily on the confidentiality of public policy statements uttered during mediation. Although the Act as presently drafted would permit overriding the confidentiality of any communication to prevent "manifest injustice," the comment letter



Reception at the Dolley Madison House: U.S. Court of Federal Claims Chief Judge Loren Smith flanked by Jeff Lubbers, Paul Verkuil, Jack Young, Ron Cass

recommends against any blanket confidentiality in the first place for communications designed to resolve matters of public policy. After considerable debate, and some discussion of secondary issues, the Council decided that Harter should submit the comment letter as drafted — with the proviso that he apprise the Act’s drafters of the Council’s concerns and include a footnote in the letter advising readers that the Council will revisit the issue at the February meeting in Dallas.

**Council Delays Taking Position on Federalism Accountability Act.** Chair-Elect Ron Levin presented the draft report and recommendation on the Federalism Accountability Act on behalf of the Ad Hoc Committee on Federalism. Carl Gold, from the Senate Government Affairs Committee and a member of Senator Carl Levin’s staff, briefed the Council on the status of the bill, which seeks to narrow the circumstances in which preemption by federal statute or regulation may be implied. He said that Senator Levin is open to and welcomes specific comments on the bill, but noted that the bill was unlikely to go to the floor



Reception at the Dolley Madison House: From L to R: Front: Rudolph Patterson, Jodi Levine, Eleanor Kinney, Sharan Levine. Back: David Roderer, Otto Hetzel, Jim Stewart, William Morrow

before Congress adjourned. The House bill has already been pulled until next session. There was considerable Council discussion of the draft report and recommendation. Tom Susman took a pragmatic approach to the bill and would vote to oppose it, since businesses are worried about the impact of the bill. Bill Funk observed that the bill seems really to be two bills — one narrowing federal preemption and one requiring federalism assessments — and that the Section is on record as opposing additional assessments on agencies without consideration of alternatives. Peter Strauss supported the nonproliferation of



Reception at the Dolley Madison House: From L to R: Front: Michael Astrue, Jack Young, Ron Levin. Back: Leonard Leo, Lynne Zusman, Hal Bruff, Daniel Rodriguez

impact statements and pushed for a general rationalization of rulemaking. Neil Eisner raised issues with respect to the additional burden of assessment requirements. Judge Williams commented about the generally murky state of preemption law, with its tremendous varieties and degrees of conflicts, and reminded the Council of the apt quote, “Don’t speak to me of reform, sir — things are bad enough as they are.” Ernie Gellhorn was “surprised by the volume and quantity of debate,” and observed that the equal numbers for and against passage “suggest the bill is about right.” After further Council discussion, Leonard Leo suggested that, despite substantive disagreements among Council members, the Section could provide assistance by listing options and standards to advance the debate. Chair-Elect Levin will take all Council comments back to the Chair of the Ad Hoc Committee, Michael Asimow.



Reception at the Dolley Madison House: Present and Former Section Chairs. From L to R: Warren Belmar, Ron Cass, Jim O’Reilly, Jack Young, William Allen, Peter Strauss, Phil Harter



Reception at the Dolley Madison House: From L to R: Sharan Levine, Michael Astrue, Lynne Zusman, Jack Beerman, Robert Anthony, David Roderer

**Arbitration Ethics Remanded.** Council member Phyllis Bernard presented a draft recommendation on revising the code of ethics for commercial arbitrators, as proposed by the Section of Dispute Resolution. Several Council members voiced concern about whether the proposal would unconstitutionally restrict commercial speech and whether proposed

conflict disclosure provisions were sufficiently comprehensive. Bernard agreed to relay the Council's concerns to the Dispute Resolution Section and present a revised recommendation to the Council at its February meeting in Dallas. Chairman Young suggested that the Dispute Resolution Section also seek comments from the Business Law Section.

**Veterans Affairs Committee Seeks Expansion of Federal Circuit Jurisdiction.** Ronald Smith, liaison to the Federal Circuit Bar Association, presented a preliminary recommendation to the Council calling for Congress to grant the Federal Circuit jurisdiction to review precedent setting decisions of the Court of Appeals for Veterans Claims that involve questions of law not previously decided by the Board of Veterans' Appeals. The Veterans Claims court hears appeals from the Board on a de novo basis. The Federal Circuit has exclusive jurisdiction over appeals from the Veterans Claims court, but the jurisdiction is limited so that some questions of law first decided by the Claims court are not reviewable by the Circuit. After some Council discussion, Chairman Young suggested that the committee seek comments from the concerned agencies and rebrief the Council in Dallas. ▲

## Section Honors Former Attorneys General and Newly-Inducted Section Fellows and Senior Fellows

The Section was privileged to host two former Attorneys General at this year's Fall Dinner. Chair Jack Young also inducted new Fellows and Senior Fellows into the Section. Senior Fellows are recognized for their service to the Section and their important contributions to the field of administrative law. Fellows are recognized for their service to the Section.



Photo by Mattox Commercial Photography

Front Row, L to R: Fellow Arthur L. Burnett, Sr., Senior Fellow Judge Stephen F. Williams, Senior Fellow Judge Richard Cudahy, Former Attorney General Elliot Richardson, Former Attorney General Richard Thornburgh, and Senior Fellow Judge Patricia Wald. Back Row, L to R: Fellow David Cardwell, Fellow Herbert Forrest, Jr., Fellow Ronald Cass, Section Chair Jack Young, Section Chair-Elect Ron Levin, Fellow Jeff Lubbers, Fellow Victor Rosenblum, Kathleen Woodward accepting the fellowship on behalf of her late husband, David Woodward.

by Michael Asimow\*

## California Advisory Opinion Statute Vetoed

In California, no state agency can furnish general guidance to the public without going through full-fledged rulemaking proceedings. The ban on so-called “underground rules” is statutory and it is strongly enforced. As California’s rulemaking process is difficult and costly, agencies almost never issue advisory rulings, bulletins, guidelines, or the like (or at least, they don’t do so legally). The California Supreme Court recently called on the legislature to supply a solution to this obvious problem.

The California Law Revision Commission (for which I was the consultant) conducted a lengthy study and apparently achieved consensus among all interested public and private parties. The Commission recommended and the legislature passed AB 486 which allowed agencies to issue advisory interpretations. Such interpretations had to be clearly labelled as such; they would have no binding effect on anyone and could receive no deference from courts. Celebrations were short-lived; Governor Gray Davis vetoed AB 486.

Amazingly, opposition came from the agencies, not the private sector. AB 486 gave agencies flexibility they don’t have now, and no agency would be compelled to use the new procedure. How could agencies be opposed to that? Rumor has it that some agencies were afraid they’d be besieged by requests for rulings, so they didn’t want the power to issue them. Other agencies were afraid that the bill might make illegal whatever methods of advice-giving they were presently using. These objections seem so specious that it is hard to believe anyone could take them seriously. Nevertheless, the opponents somehow got the Governor’s ear. California agencies still cannot tell the public what they think the law means.

## No Need to Request Reconsideration Before Seeking Review

In *Sierra Club v. San Joaquin Local Agency Formation Commission*, 981 P.2d 543 (1999), the California Supreme Court held that a party seeking judicial review need not first ask the agency to reconsider its decision. The Court thus overruled *Alexander v. State Personnel Bd.*, 137 P.2d 433 (1943), which held that a

party must always seek reconsideration in order to exhaust administrative remedies.

The Court in *Sierra Club* held that the *Alexander* case was a trap for the unwary and served no useful purpose (since an agency is unlikely to change its decision once it is made). Of course, a party must seek reconsideration before going to court if a statute requires it or if the party wishes to raise errors of fact or law that were not previously addressed in the agency proceedings.

## Administrative Hearing Process Unconstitutional<sup>1</sup>

The Minnesota Supreme Court found the administrative child support hearing process conducted by the Minnesota Office of Administrative Hearings to be unconstitutional in *Holmberg v. Holmberg*, 588 N.W.2d 720 (Minn. 1999). The court found that the process violated the separation of powers clause of the Minnesota Constitution because it infringed on the original jurisdiction of the state’s trial courts. It noted that family law was within the original jurisdiction of the courts and that child support matters rely on the court’s equitable powers.

Administrative law judges were found to be exercising judicial authority because the statute in question granted them all powers conferred on district court judges in regard to child support, gave them authority to modify district court child support orders, and gave ALJ orders the same deference on appeal as trial court orders.

The court distinguished cases upholding the executive branch tax court and the executive branch workers compensation hearing process and announced five factors (based on Minnesota case law) to be considered in deciding whether an administrative adjudication process is constitutional: 1) the adequacy of judicial checks, 2) the nature of the function delegated (judicial vs. legislative), 3) if and how the decisions are appealable, 4) the voluntariness of entry into the administrative process, and 5) whether the delegation by the legislature was comprehensive (like workers comp) or piecemeal (like child support).

The child support workers participating in the hearing process were found to be engaged in the unauthorized practice of law because they signed pleadings and represented the public authority at the hearing.

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<sup>1</sup>The information in this article was provided by George Beck, an Administrative Law Judge in the Minnesota Office of Administrative Hearings.

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## Florida Supreme Court Holds Agencies Can Issue Declaratory Statements Addressing Issues of General Applicability<sup>2</sup>

The Florida Supreme Court resolved a tension between two innovations in Florida's Administrative Procedure Act in *Florida Dep't of Bus. & Prof. Reg. v. Investment Corp. of Palm Beach*, 1999 WL 1018661 (Nov. 4, 1999). The case concludes that the declaratory statement process under Florida's APA (Fla. Stat. §120.565) allows an agency to issue statements regarding issues that extend beyond a petitioner's particular factual situation, despite another provision of Florida's APA requiring any agency statement of general applicability to be adopted by rule. See Fla. Stat. § 120.54.

Investment Corporation of Palm Beach (Investment Corp.) requested a declaratory statement from the Division of Pari-Mutual Wagering regarding the applicability of several statutory provisions in determining the distribution of uncashed tickets and breaks generated from wagering on out-of-state thoroughbred races rebroadcast to its subsidiaries. The order issued by the Division stated, "The Division is cognizant that a similar fact pattern may exist between other tracks in Florida and that the same dispute may reoccur between one of these Petitioners and a non-Petitioner. Therefore, the Division will initiate rulemaking to establish an agency statement of general applicability." The Third District Court of Appeal held that "once the Division reached the conclusion that the questions asked of it in the petitions had general applicability to the pari-mutuel industry, thus requiring rulemaking, the Division overstepped administrative bounds when it issued the declaratory statement." 714 So.2d 589, 590-91 (Fla. 3d DCA 1998). Even though the Division had commenced rulemaking, the appellate court held the Division's declaratory statement invalid. The Supreme Court reviewed the case because of a conflict with the First District Court of Appeals' decision in *Chiles v. Dep't of State*, 711 So.2d 151 (Fla. 1st DCA 1998), which allowed the agency to issue a declaratory statement regarding a matter of general applicability.

On appeal, the Supreme Court rejected the Third District's conclusion, instead allowing the agency to issue a declaratory statement even though the statement concerns a matter of general applicability. The Court recognized the practical significance of declaratory statements, noting "it is sensible for courts to encourage agencies to be responsive to specific questions and then anticipate whether a broader application may occur and take action accordingly." It rea-

soned, "under circumstances such as those presented in this case, involving such a unique industry having very limited participants engaged in almost identical operations, declaratory statements as to one would almost invariably be of interest to others in the very limited group." According to the Court, the declaratory statement provision of Florida's APA, which requires published notice and allows an opportunity for intervention, provides adequate safeguards for similarly situated parties. Thus, the Court rejected the "hypertechnical" interpretation of Florida's APA that would have precluded agencies from adopting declaratory statements extending beyond the particular circumstances of the requesting party.

Beyond resolving the appropriateness of issuing a declaratory statement on an issue of general applicability, the case is significant for the Supreme Court's endorsement of lower appellate court cases in the First District Court of Appeal interpreting Florida's 1996 APA amendments. See *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So.2d 72 (Fla. 1st DCA 1998); *Chiles v. Dep't of State*, 711 So.2d 151 (Fla. 1st DCA 1998). These cases resolve conflicting signals in the revised APA in a way that suggests that courts "will not micro-manage Florida's administrative agencies and that the public's interest is served in encouraging agency responsiveness in the performance of their functions."

## California Statute Provides Expedited Judicial Review of First Amendment Claims in Permit Proceedings.<sup>3</sup>

The California legislature enacted emergency legislation to respond to the Ninth Circuit's decision in the case of *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998). *Baby Tam* held that a city business license ordinance violated the First Amendment because it did not provide for prompt judicial review of an adult bookstore's challenge to an alleged prior restraint on speech.

The new California Code of Civil Procedure Section 1094.8 provides for expedited judicial review of first amendment related claims that arise in permit proceedings.

## Tennessee Medicaid Settlement Agreement Provides for ALJ Independence<sup>4</sup>

The State of Tennessee has recently agreed to extensive and far-reaching provisions to protect the rights

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<sup>2</sup> The information for this article was Jim Rossi, Professor of Law, Florida State University College of Law; Co-Chair, State Administrative Law Committee.

<sup>3</sup> The information in this article was provided by Professor Greg Ogden, Pepperdine Law School.

<sup>4</sup> The information in this article was provided by Ann Marshall Young, Administrative Law Judge with the Tennessee Department of State Administrative Procedures Division.

of persons denied medical services under the state's managed-care alternative to Medicaid, TennCare. See *Grier et al. v. Wadley et al.*, Civil Action No. 79-3107, U. S. District Court for the Middle District of Tennessee, same case as *Daniels v. Wadley*, 926 F.Supp. 1305 (M.D.Tenn 1996)). In a new consent decree entered October 26, 1999, the parties agreed to an array of terms relating to Medicaid services.

One section of the order addresses the impartiality of the appeal process, including provisions that the state shall not "impair or threaten to impair the independence or autonomy of individuals charged with handling or deciding appeals," "encourage or demand the waiver of rights," or engage in ex parte communications with ALJs. The state also agreed not to appeal any decisions of ALJs in which TennCare enrollees prevail (except for ALJ interpretations of federal law).

The order has been challenged by provider groups, primarily for provisions more directly related to the provision of medical services, which will allegedly

raise costs. Meanwhile, other proposed TennCare reforms, announced by the state at the end of November, have drawn fire for limiting benefits.

### State Administrative Law Articles

Allen, Arch T., III, *a Study in Separation of Powers: Executive Power in North Carolina*, 77 N.C. L. REV. 2049 (1999).

Baron, Roger M., *When Insurance Companies Do Bad Things: the Evolution of the "Bad Faith" Causes of Action in South Dakota*, 44 S.D. L. REV. 471 (1999).

Bruno, Klint L. and Michael L. Closen, *Notaries Public and Document Signer Comprehension: a Dangerous Mirage in the Desert of Notarial Law and Practice*, 44 S.D. L. REV. 494 (1999). Carver, Terri L., *Administrative Law*, 50 MERCER L. REV. 827 (1999).

Fessler, Daniel Wm. and Cynthia McArthur Morelli, *Franchise Modification and Constitutional Confrontation: an Avoidable Crisis of Consumer Expectations and Investor Trust*, 44 S.D. L. REV. 552 (1999).

Sebastian, Julie Ann et al., *Survey of Illinois Law: Administrative Law*, 23 S. ILL. U. L.J. 803 (1999). ◆

## Nominating Committee Seeks Recommendations

The Nominating Committee invites Section Member suggestions for candidates for the following elective positions for FY 2000-2001:

Council Member (4 vacancies)

Vice Chair (who automatically would become Chair-Elect the following year)

Secretary

Budget Officer

Assistant Budget Officer

Please feel free to convey your suggestions directly to one of the following Nominating Committee members, or to the Section Staff (Leanne Pfautz or Cindy Burns) c/o American Bar Association, 740 15<sup>th</sup> Street, N.W., Washington, DC 20005.

Warren Belmar - Chair  
Capitol Counsel Group, L.L.C.  
1155 21st Street, N.W., Suite 325  
Washington, DC 20036  
202/785-4013  
202/785-4050 - FAX  
capitol.counsel@worldnet.att.net

Anne E. Dewey  
Office of Federal Housing  
Enterprise Oversight  
1700 G Street, N.W.  
Washington, DC 20552  
202/414-3803  
202/414-3823 - FAX  
adewey@oftheo.gov

James O. Neet, Jr.  
Shook, Hardy & Bacon, P.C.  
One Kansas City Place  
1200 Main, 26th Floor  
Kansas City, MO 64105  
816/474-6550 x2208  
816/421-5547 - FAX  
jneet@shb.com

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# 2000 Midyear Meeting Dallas, Texas

February 10 – 13, 1999  
The Four Seasons at Las Colinas

Photo courtesy of the Dallas Convention & Visitors Bureau



## MEETING INFORMATION

### HOTEL RESERVATIONS

The Four Seasons at Las Colinas  
4150 MacArthur Boulevard  
Irving, TX 75038  
Telephone: (972) 717-0700  
Guest Fax: (972) 717-2550

The Four Seasons hotel has reserved a limited number of rooms for Section members. The room rate is \$230 single/double, excluding taxes. The ABA block of rooms will be held only until **Thursday, January 20, 2000**. In order to reserve your room, please call the hotel directly at (972) 717-0700, identify yourself as an ABA attendee, and guarantee your reservation by credit card with one night's room deposit. If you are interested in a list of nearby lower cost hotel alternatives, please contact Cindy Burns at (202) 662-1528.

### Registration

To register for the 2000 Midyear Meeting, please use the Meeting Registration Form in this News. The final deadline for advance registration is **Thursday, January 20, 2000**. We must receive your registration by this date in order for your name to appear in the Attendee List. Payment may be made by check or credit card. The Section accepts American Express, Master Card and VISA.

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# 2000 Midyear Meeting Schedule

Chair: Ronald L. Smith

**Friday, February 11**

**Registration**

8:00 – 9:00 a.m. • The Four Seasons • Office

**Ethical Issues Common to the Practice of Administrative Law**

Co-Sponsored by the Administrative Law Section of the State Bar of Texas

9:00 – 11:30 a.m. • The Four Seasons • Conference Room 3

A panel of experienced Administrative Law practitioners will present scenarios of commonly occurring ethical situations. The audience will be asked to participate in resolving the dilemmas presented.

**Section Luncheon**

12:00 – 1:30 p.m. • The Four Seasons • The Gallery

**Project to Review the Administrative Procedure Act**

2:00 – 5:00 p.m. • The Four Seasons • Conference Room 3

The reporters on Openness will discuss their preliminary drafts. The audience will be asked to participate in the draft review process.

Moderator: *Paul R. Verkuil*, Benjamin N. Cardozo School of Law, New York, NY

Panelists:

▶ *Thomas M. Susman*, Ropes & Gray, Washington, DC

▶ *David Vladeck*, Public Citizen Litigation Group, Washington, DC

**Section Reception**

5:00 – 6:30 p.m. • The Four Seasons • The Byrons

**Saturday, February 12**

**Section Continental Breakfast**

8:00 – 9:00 a.m. • The Four Seasons • Conference Room 3

**Section of Administrative Law and Regulatory Practice Council Meeting**

9:00 a.m. – 12 noon • The Four Seasons • Conference Room 3

**Section Reception/Dinner**

7:00 p.m. • Via Real

**Sunday, February 13**

**Section Continental Breakfast**

8:00 – 9:00 a.m. • The Four Seasons • Conference Room 3

**Section of Administrative Law and Regulatory Practice Council Meeting**

9:00 a.m. – 12 noon • The Four Seasons • Conference Room 3

All section members and guests are encouraged to attend

**Saturday Afternoon Activities**

**Section Golf Outing**

Golf tee times are available on the Tournament Players Course, home of the GTE Byron Nelson Classic. Tee times are from 1:04 p.m. – 1:20 p.m. Tickets are limited and are offered on a first-come, first served basis. Please note that \$125 for green fees and cart is due to the Four Seasons on the day of play or fees can be charged to your room.

**Round Robin Tennis Tournament**

Play will begin promptly at 1:00 p.m. on the indoor courts of the Four Seasons Sports Club. Tickets are limited and are offered on a first-come, first served basis. Please note that \$20 per person per hour is due to the Four Seasons on the day of play or fees can be charged to your room.

**6<sup>th</sup> Floor Museum Tour**

1:00 – 4:30 p.m.  
(minimum of 14 required)

The 6<sup>th</sup> Floor Museum at Dealey Plaza examines the life, times, death and legacy of President John F. Kennedy. The Museum is located on the sixth floor of the former Texas School Book Depository building. Historic photographs, artifacts and original interviews analyze Kennedy's lasting impact on American culture.

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# 2000 Midyear Meeting Registration Form

Registration requests must be received by **Thursday, January 20**, so that your name may be included in the pre-registration list given to all attendees. Please complete this form and mail it with your check to the address below. Credit card registrations may be faxed to (202) 662-1529.

## Registrant Information

Name: \_\_\_\_\_  
(as you wish it to appear on your badge)

Affiliation: \_\_\_\_\_

Address: \_\_\_\_\_

City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Please check all programs/activities you wish to attend

### Friday, February 11

Ethical Issues Common to the Practice of Administrative Law .....  No Charge

Section Luncheon.....  \$40

Project to Review the Administrative Procedure Act .....  No Charge

Section Reception .....  \$35

### Saturday, February 12

I plan to attend the Saturday Council Meeting.....  No Charge

6<sup>th</sup> Floor Museum Tour .....  \$20

Section Golf Outing .....  Fee due day of play

Round Robin Tennis Tournament.....  Fee due day of play

Section Reception and Dinner.....  \$75

### Sunday, February 13

I plan to attend the Sunday Council Meeting.....  No Charge

Total \$ \_\_\_\_\_

Cancellations: Ticket refunds will be honored up to 72 hours preceding the event.

## Method of Payment

Check (made payable to the ABA)     Visa     MasterCard     American Express

Card Number: \_\_\_\_\_ Exp. Date: \_\_\_\_\_

Signature: \_\_\_\_\_

Mail to: ABA, Section of Administrative Law and Regulatory Practice, 2000 Midyear Meeting,  
740 15<sup>th</sup> Street, NW, Washington, DC 20005-1022, Telephone: (202) 662-1528 Fax: (202) 662-1529.

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## CLE Accreditation

Accreditation for the programs has been requested from all states with mandatory continuing legal education. Please be aware that each state has its own rules and procedures as well as its own definition and categories for "CLE." Check with your state for confirmation of program approval.

## Airline Information

For rate information or to make reservations attendees should contact the airlines directly using the ABA reference number. To meet individual needs attendees should compare all options available, including flight schedule and rates and restrictions between airline fares and ABA rates. The ABA rates are available through your travel agent, the ABA travel agency at 800/621-1083 or directly from the airline.

American Airlines 800-433-1790, ABA # S11803

Delta Air Lines 800-241-6760, ABA # DMN126400A

Southwest Airlines 800-433-5368, ABA #F1120

## Upcoming Meetings



**2000 Spring Meeting**  
Williamsburg Lodge  
Williamsburg, Virginia  
April 27 - 30, 2000

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

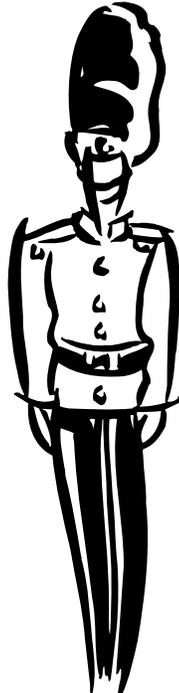
St. James Court Hotel  
London, England  
July 15 - 20, 2000

**2000 Section Fall Meeting**  
Westin Fairfax  
Washington, DC  
October 12 - 15, 2000

**2001 ABA/Section Midyear Meeting**  
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**  
Chicago, IL  
August 2 - 5, 2001



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# A Second Opinion? Inconsistent Interpretive Rules

by Michael Asimow\* and Robert A. Anthony\*\*

Recent D. C. Circuit opinions have declared – erroneously, in our view – that an agency must use notice and comment rulemaking to change its interpretation of a regulation. In *Alaska Professional Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999), the court invalidated a notice that reinterpreted the FAA regulation defining “commercial [aircraft] operator.” Under the former interpretation, in effect for 35 years, Alaskan pilot-guides were not covered by the definition. Under the new interpretation, they were treated as commercial operators and became subject to extensive additional regulation. “When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.” *Id.* at 1034. The court cited *Paralyzed Veterans of America v. D. C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997), and *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997), where similar propositions were expressed in dicta, and quoted from *Paralyzed Veterans*: “Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself, through the process of notice and comment rulemaking.”

These statements disrespect APA § 553(b)(A)’s exemption for interpretive rules. Under it, a document is exempt from notice-and-comment requirements if it is labeled as an interpretation, has no independent legal effect on persons in the private sector, and genuinely interprets language in a statute or regulation, such that its meaning flows fairly from the substantive content of the regulation. This test may be hard to apply in specific situations. But where a document does actually interpret a regulation, as the new interpretation clearly did in *Alaska Prof’l Hunters*, it is exempt, even if (as in that case) it contradicts a prior interpretation or impairs investment-backed reliance interests.

Although the changed interpretation therefore cannot be overturned for failure to use notice and comment, it can be challenged on other grounds.

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\* Professor of Law, UCLA Law School; Co-Chair, State Administrative Law Committee; Co-Reporter on Adjudication, APA Project.

\*\* GMU Foundation Professor of Law, George Mason University School of Law; Vice-Chair, Judicial Review Committee; Vice-Chair, Rulemaking Committee.

First, an agency changing its position must articulate a reasoned explanation for its change, supported by factual information in the record. Failure to do so can result in judicial invalidation on arbitrary-and-capricious grounds under APA § 706(2)(A). See *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970). Where the agency interpretation represents a 180-degree reversal of a longstanding position, the agency should supply an especially thorough and well-supported explanation, with particular attention to adverse effects on those relying on the old position.

A second path is to challenge the substantive validity of the new interpretation. Its validity turns on whether it has expressed the meaning of the regulation in substantive terms that are judicially acceptable. Judicial acceptability depends on the test used by the reviewing court: Does the court form its own views about correct and incorrect meanings of the regulation or does it extend some degree of deference to the agency’s interpretation?

We believe that a reviewing court should reach its own independent determination of whether the agency correctly interpreted the regulation, and deference should consist of nothing more than respectful consideration of the agency position. See *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Agencies informally interpreting their own regulations are not exercising lawmaking powers. Therefore there is no basis for requiring the courts to accept those interpretations whenever their content is “reasonable,” and the courts are free to address the interpretive issues with judicial neutrality.

Where the interpretation changes an earlier interpretation, any deference should be minimal, because the considerations associated with respecting an agency’s interpretation are typically absent: The new interpretation is not consistent with earlier ones, it is not of long standing, it was not adopted

contemporaneously with the regulation, it was not adopted with public participation, and it is likely to disturb reliance interests. Thus the court is in a clear position to determine its own interpretation of the agency regulation, and to set aside the agency interpretation if it does not concur with the court’s. An agency interpretation should of course be accorded the consideration that the agency’s specialized work may warrant. Very often – probably in the great majority of cases – the court’s independently

arrived-at interpretation will concur with that of the agency. But that outcome should be the result of the court's own free decision, not of some mechanistic deference to an informal agency position not promulgated by notice and comment or otherwise pursuant to delegated lawmaking authority.

The Supreme Court, unfortunately, has set forth a different test: An agency's interpretation of its own regulation "must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945). This standard bespeaks a mode of deference that is downright abject and gives agency interpretations a prodigious practical binding effect.

In our opinion this formula should be overruled. It is antidemocratic, unfair and flatly inconsistent with the APA.

Viewed realistically, it grants agencies and even lower level officials the power to use informal documents to impose duties that are binding in practical terms (even though not legally binding) because the courts will almost always uphold them. It also encourages agencies to promulgate vague regulations and then wait to spell out details later in informally-issued "interpretations."

We have grave misgivings about a standard that essentially allows the agency to be the judge in its own interpretive cause. The agency should bear responsibility for the clarity of its regulations, which are legislative acts objectively put forth for all to see and to interpret by their lights. An agency interpretation should of course get fair judicial consideration. But a

private party ought to be able to derive its own interpretation and argue it to the court, without being automatically trumped by the agency's (often self-serving) interpretation. The manifest purpose of APA § 706, which mandates that "the reviewing court \* \* \* shall determine the meaning or applicability of the terms of an agency action," is to give affected persons recourse to an independent judicial interpreter.

Thus, an agency's interpretation of its regulations should be upheld only where the court, taking due account of the agency's reasoning, deems it correct. (In many situations, where even precise regulatory language cannot cover all detailed circumstances, a range of values should be regarded as correct, with the agency free to adopt any position within the range.) If the court reaches an interpretation different from the agency's in the case at bar, the question arises as to whether the agency thereafter can maintain its prior position (or change to another new position). It can of course do so by amending the regulation through notice and comment. It should not do so otherwise by means not representing the exercise of delegated legislative authority. As a practical matter the agency might try nonacquiescence, enforcing its preferred position against private parties in the hope that, if challenged, it could persuade a reviewing court to reject the adverse judicial precedent. But it would be running the risk that a court will again invalidate its actions and impose Equal Access to Justice remedies to boot.

In sum, a changed agency interpretation of a regulation need not be promulgated by notice and comment, but can be attacked for failure to supply an adequate explanation or on grounds of incorrectness. ◆

## Spring ADR Conference

The American Bar Association Section of Dispute Resolution will hold its Annual Conference on Dispute Resolution "ADR By the Bay: The Golden Gate to Collaborative Problem Solving," in San Francisco April 6-8, 2000 at the Hilton. The conference will bring together bench, bar and ADR leaders to discuss major developments and innovations in the field. Some of the programs that might be of interest to Administrative Law Section members are: "Does Legislation Promote Use of ADR by States? Or is

It Necessary But Not Sufficient to the Task," "Using Dispute Resolution in Government Litigation at the State & Federal Levels," "Using Dispute Resolution in Bankruptcy Court; Challenges & Opportunities," "Mediating with the Federal Government: An Opportunity Not Without Risk." For more information on this conference, call 202/662-1680, send an e-mail to [dispute@staff.abanet.org](mailto:dispute@staff.abanet.org) or visit the Section website at [www.abanet.org/dispute](http://www.abanet.org/dispute). ◆

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# Supreme Court and Circuit News (abridged)

As this issue of the *News* goes to press, the Supreme Court has not decided *any* cases, unless you count certifying a question of state law to a state supreme court as deciding something, *see Fiore v. White*, 120 S.Ct. — (1999). Awaiting decision at this time, however, are several regulatory issues. The most celebrated case is probably the “cigarette case,” *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, argued on December 1. The Fourth Circuit held that cigarettes were not subject to the FDA’s jurisdiction under the Food, Drug & Cosmetic Act as “drugs” or “devices.” *See FDA v. Brown & Williamson Tobacco Corp.*, 153 F.3d 155 (1998). A brooding omnipresence in the case is what role *Chevron* should play in the Court’s analysis of FDA’s interpretation of the statute, an interpretation that renounces an earlier interpretation to the contrary, allegedly on factual rather than policy grounds.

The limits of the Commerce Clause will get its first Supreme Court test since *United States v. Lopez*, 514 U.S. 549 (1995), in *Brzonkala v. Morrison*. In that case the Fourth Circuit held that the Violence Against Women Act’s provision allowing for private causes of action by women against their attackers was unconstitutional as beyond the power of Congress under both the Commerce Clause and the 14<sup>th</sup> Amendment. *See* 169 F.3d 820 (4<sup>th</sup> Cir. 1999). If the Court finds the same way it did in *Lopez*, it will send a clear message that *Lopez* is not an anomaly, as some lower courts have suggested.

The Fourth Circuit struck again in *Reno v. Condon*, 155 F.3d 453 (1998), in which it held that the Driver’s Privacy Protection Act, barring state motor vehicle departments from disclosing “personal information” contained in motor vehicle records for purposes not authorized by the act, was unconstitutional under the 10<sup>th</sup> Amendment. The Supreme Court heard argument in the case on November 10.

The continued viability of citizen suits after the standing decisions in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), *Lujan v. Defenders of the Wildlife*, 504 U.S. 555 (1992), and *Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), will be tested or revived in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 149 F.3d 303 (4<sup>th</sup> Cir. (!) 1998), in which a citizen suit was dismissed on appeal for lack of standing because the district court, while it granted penalties against the defendant for permit violations, denied an injunction on equitable grounds. The court of appeals held that once the injunction was denied, plaintiffs had no

injury to be redressed and lost standing. Argued in the first week of the Term, this case is likely to be decided before this *News* reaches readers.

Finally, on November 8, the Court heard arguments in *Shalala v. Ill. Council on Long Term Care, Inc.*, a more traditional administrative law case decided by the 7<sup>th</sup> Circuit at 143 F.3d 1072 (1998). This case originally involved a challenge by an association of nursing homes to Medicare and Medicaid regulations, arguing that they are unconstitutionally vague in violation of due process, and to an HHS manual used by inspection teams, arguing that it is a substantive regulation that did not go through notice-and-comment and hence is invalid. The issue before the Supreme Court, however, is whether a provision of the Social Security Act bars pre-enforcement judicial review of the regulations altogether. The 7<sup>th</sup> Circuit’s decision held that such challenges are not barred, creating a split in the circuits because the 6<sup>th</sup> Circuit had held the opposite in *Michigan Association of Homes & Services for the Aging, Inc. v. Shalala*, 127 F.3d 496 (6<sup>th</sup> Cir. 1997).

## In the Circuits

Probably the highest visibility case in the circuits is still *American Trucking Assns v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999)(per curiam), *as modified by* — F.3d — (1999)(petition for rehearing en banc denied). This is the case reported in the last issue of the *News* that overturned EPA’s updated particulate and ozone National Ambient Air Quality Standards. What received the most press was the portion of the court’s decision (authored by Section Council member Judge Stephen Williams), to which Judge Tatel dissented, that held EPA’s interpretation of the Clean Air Act to be unconstitutional because under that interpretation the Act would involve an unconstitutional delegation of legislative authority. Rather than declare the Act unconstitutional or interpret the Act in a way to avoid the constitutional problem (as the Supreme Court did in *Industrial Union Dept v. API*, 448 U.S. 607 (1980), with respect to the Occupational Safety and Health Act), the D.C. Circuit remanded the case to EPA to attempt to come forward with an interpretation that would not involve an unconstitutional delegation of legislative power. On denial of rehearing en banc (in which the actual votes were 5-4 *in favor* of rehearing, but, because two judges did not vote, the number voting did not constitute a majority of the court), the court clarified why it avoided deciding the matter itself. It

explained that since *Chevron, USA v. NRDC*, 467 U.S. 837 (1984), courts must defer to agencies' reasonable interpretations of ambiguous statutory terms. Here, the statutory provision is ambiguous, and while EPA's initial interpretation was unreasonable, because it would interpret the statute to grant an unconstitutional delegation of legislative power, the agency should be afforded the opportunity to interpret the statute in a reasonable and constitutional manner. The court recognized that "A remand of this sort of course does not serve [one of the] key

function[s] of non-delegation doctrine, to 'ensure[ ] to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.'" But it did, the court said, serve two of the key functions: to create a standard to assure the agency's action is not arbitrary and to facilitate judicial review. Given the split in the court, the novel theory of law, and its implications, there is a substantial likelihood that this case will be headed across town. ◆

## Judicial Review under APA

*Continued from page 1*

appeal by rule and suspends the effect of the administrative action pending the appeal. 5 U.S.C. § 704. The judge-made doctrine of exhaustion gave a different answer: as Professor Jaffe explained, it required a party to exhaust all administrative remedies, including intra-agency appeals, that are "(a) available to him on his initiative (b) more or less immediately and (c) will substantially protect his claim of right." *Darby* abandoned the common law in favor of the APA rule.

### Until *Darby*, was decided in 1993 the APA rule had been overshadowed by the judge-made doctrine.

Yet until *Darby* was decided in 1993—nearly a half century after 1946—the APA rule had been overshadowed by the judge-made doctrine. Indeed, the APA rule was not applied at all until the 1970's and, while a few circuit court decisions then considered the APA rule, most held that it did not supersede the common-law doctrine. Indeed, administrative common law held so much sway that the first circuit to follow the APA rule reversed course within seven years, holding that the APA could not limit exhaustion requirements "of judicial origin" because numerous cases "clearly demonstrate the existence of an active judicial control over certain exhaustion requirements."<sup>2</sup> In 1983, Professor Davis lamented that the APA provision "is relevant in hun-

dreds of cases and is customarily overlooked." Though *Darby* finally vindicated the APA's rule, even the Court expressed its "surpris[e]" both at the length of time needed for the issue to be resolved and at the mere "handful of opinions in the Courts of Appeals" that had considered the effect of the APA on the judge-made law of exhaustion.

The clash between the APA and administrative common law, especially the administrative common law governing judicial review, is not unique to *Darby*. And, as in *Darby*, administrative common law is now finally beginning to be replaced by doctrine more consistent with the original meaning of the APA's judicial review provisions. The change is slow and halting, for courts are reluctant to abandon their own creations in favor of the statutory law created by Congress. Major judge-made doctrines such as the ubiquitous *Chevron* doctrine continue to thrive even though the courts have not even attempted to reconcile their doctrine with the statute. Yet undeniably the federal courts are treating the statutory law with more care. Why this change is occurring more than a half century after Congress enacted the APA is a fascinating tale—one that provides insights into our constitutional system and into the vast changes that the last five decades have wrought in the federal courts' conceptions of their own legitimate powers in that system.

### Traditional Limitations on Judicial Lawmaking in the Federal Courts

The distinction between law based on written text (whether statutory or constitutional) and law fashioned by judges or "common law" has been important to the federal courts since the early Republic. As early as 1807, the Supreme Court in *Ex parte Bollman* held that there were basic differences between federal courts and "[c]ourts which originate in the common law." Because federal courts "are created by written law," they may not decide "any question" unless "the power to determine [the question] . . . [is] given by written law." By 1834,

<sup>2</sup> *Montgomery v. Rumsfeld*, 572 F.2d 250, 253-54 (9th Cir. 1978).

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the Court found it “clear” that “there can be no common law of the United States” since “[t]here is no principle which pervades the union and has the authority of law, that is not embodied in the constitution or laws of the union.”<sup>3</sup>

These traditional restrictions on federal common law reinforce two fundamental features of our Constitution: federalism and separation of powers. Federal common law threatens federalism because it circumvents the enumerated legislative powers of the federal government. If the federal courts could fashion law in any case over which they had jurisdiction, then there appears to be no good reason why the courts would be limited in that lawmaking enterprise to the list of enumerated powers in Article I, Section 8, which, after all, applies only to Congress, not to the courts. While this problem would be mitigated if the federal courts chose to confine their lawmaking to the enumerated powers, that “solution” would still leave a tremendous separation of powers problem.

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**The framers included a host of checks to help insure that federal laws would be enacted by democratically accountable officials.**

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Article I, Section 1 of the Constitution vests “All legislative Powers” in the Congress. This clause itself provides a sound textual basis for doubting that the federal courts have power to fashion law without legislative authorization. Structural features of the Constitution provide further reason. In designing the Article I legislative process, the framers included a host of checks to help insure that federal laws would be enacted by democratically accountable officials, and that the legislative process could move forward only with a consensus among political actors with different constituencies. For example, one does not have to be a fan of the ultimate result in *Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985), to acknowledge that the Court correctly recognized that the federal legislative process contains many protections of State interests. Similarly, the bicameralism and presentment features of Article I help to protect the separation of powers by insuring that fed-

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<sup>3</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 657-58 (1834). *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), was no exception to this approach. The Court there applied not federal common law but “general” common law, which, at least in theory, derived from custom and was “in a great measure, not the law of a single country only, but of the commercial world.” *Id.* at 19.

eral laws—including those that might shift power between the branches—are not enacted without either agreement between the Executive and Congress, or a supermajority in both Houses of Congress. These structural features provide good evidence that the framers did not intend the Article I legislative process to be circumvented by unaccountable courts manufacturing law *sua sponte*.

All of this is not to deny that broadly worded statutes will often generate a case law resembling common law. The Sherman Act is the most frequently cited example. Such statutes may be interpreted as authorizations for common law—i.e., as delegations to the judiciary to create law, just as standard administrative statutes delegate similar power to the Executive Branch. But one might expect that courts engaging in judicial review—courts demanding that executive branch agencies identify the basis in law for their actions—would be careful to identify the textual basis for their power to fashion judge-made law. The history of administrative common law shows that has not always been so.

**The Administrative Common Law, the APA, and the New Federal Common Law**

If the judicial review provisions in the APA were intended to provide a comprehensive statement of the right, mechanics and scope of judicial review, what explains the numerous judge-made doctrines such as exhaustion, ripeness and *Chevron* that dominate the area? And, perhaps more importantly, how can these doctrines be reconciled with basic restrictions on federal common law if the doctrines are (as K.C. Davis claimed) “law made by judges in *absence* of relevant constitutional or statutory provision”? The first question is easier, for a justification is more difficult than an explanation.

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**Equity had been the domain of federal judge-made law since the founding of the Republic.**

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Judicial review in the early administrative era grew up in the federal equity jurisdiction, with parties wronged by administrative action seeking injunctive relief against arbitrary and unlawful actions by the responsible officials. Equity had been the domain of federal judge-made law since the founding of the Republic, and many doctrines of administrative common law grew up by analogy to

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other judge-made equity law. For example, the exhaustion doctrine began with equity courts drawing an analogy to the rule that parties having an adequate remedy at law were not entitled to equitable relief. The dominance of judge-made law in equity was, however, just another example of a statutorily-authorized common law. The statutes conferring equity jurisdiction had been interpreted, correctly in all likelihood, as vesting the federal courts with a power to administer a judge-made law of equity. But, while early administrative law was dominated by judge-made law, it remained closely tied to, and restrained by, traditional principles of equity. Thus, as late as 1944, two years prior to the enactment of the APA, Justice Frankfurter could plausibly claim that there was “no such thing as a common law of judicial review in the federal courts.” *Stark v. Wickard*, 321 U.S. 288, 312 (1944) (Frankfurter, J., dissenting). But there was such a thing as the federal common law of chancery, and it provided an avenue of relief from unlawful administrative action.

Things should have changed in 1946. Statutory law should have assumed the dominant position in cases covered by the APA, which means just about all cases reviewing federal administrative action. Yet for decades, judge-made law continued to thrive. Perhaps it is not surprising that judges would cling to their roles as law-givers in the doctrinal area that was one of waning equity’s most significant contributions to the twentieth century—judicial review over the newly created administrative agencies. But other forces were also working against the ascendancy of statutory law.

First, there was the influential *Attorney General’s Manual on the APA*, a highly political document designed to minimize the impact of the new statute on Executive agencies. By characterizing the judicial review provisions of the APA as a mere “restatement” of “general principles” that “must be carefully coordinated with,” and “interpreted in light of,” existing case law, the *AG’s Manual* went a long way in suggesting that the APA should be treated as less binding than other statutes. That suggestion was wrong. Attorney General Thomas Clark had no support in the text of the statute or in its legislative history for his broad gloss on the statute. In fact, most of the passages from the legislative history cited by Clark to bolster his “restatement” thesis were letters sent to Congress by Clark himself.

Some members of the bar noticed that the Executive Branch was placing quite a spin on the new Act. For example, an editorial by the American Bar Association in 1947 warned that Executive agencies were “striv[ing] to minimize the import and effect” of the APA’s judicial review provisions by claiming that the

Act “merely embodied” prior practice and procedure. This “official interpretative pattern” showed a “[d]ivergence” between “the legislative intent” and “the views of those whose procedures and practices were to be regulated and curbed by the new Act.” Yet despite that warning, the Attorney General’s shrewd restatement theory was soon reflected in the case law. Even today, though the Supreme Court in 1990 rejected the view that “the judicial review provisions of the APA [are] no more than a restatement of pre-existing law,” *Lujan v. Defenders of the Wildlife*, 497 U.S. 871, 883 (1990) (Scalia, J.), courts continue to be misled by the *AG’s Manual*. See, e.g., *Old Town Trolley Tours of Washington, Inc. v. Washington Metro Area Transit Comm’n*, 129 F.3d 201, 204 (D.C. Cir. 1997) (citing the *Manual* for the restatement thesis).

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### The APA had the misfortune of being enacted at the dawn of the era of “The New Federal Common Law”.

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But the AG’s spin on the APA might have been less successful were it not for a pervasive and overarching intellectual movement in federal law. For the APA had the misfortune of being enacted at the dawn of the era of “The New Federal Common Law” (in the words of Judge Friendly)—an era when leaders of the federal bar and bench were calling for an aggressive formulation of federal common law. For a time stretching from the late 1940’s into the 1970’s, this view reigned. To understand just how different that era is from our own time, one need only read Judge Friendly’s article *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). Judge Friendly, it must be remembered, was one of the most careful, restrained and conservative judges of the era. Yet he praised the federal courts of his time for employing a variety of “techniques” to fashion federal common law, including implying private rights of action from statutory silence, interpreting grants of jurisdiction as mandates for federal judge-made law, and even creating law solely from the existence of federal interests—a technique he called the “spontaneous generation” of federal common law. Moreover, Friendly claimed:

One of the beauties of the . . . [New Federal Common Law] doctrine for our day and age is that it permits overworked federal legislators, who must vote with one eye on the clock and the other on the

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next election, so easily to transfer a part of their load to federal judges, who have time for reflection and freedom from fear as to tenure and are ready, even eager, to resume their historic law-making function—with Congress always able to set matters right if they go too far off the desired beam.

Democratic accountability was itself seen as a problem: The work of legislators was to be disfavored *because* they had “one eye on the next election,” and the legislation of “eager” judges was to be favored *because* they have “freedom from fear as to tenure.” With these assumptions, there was nothing so extraordinary with finding an authorization for judge-made law in “only the smallest bit of legislating,” “a bit of legislative history,” or even nothing at all.

The New Federal Common Law gave the courts not only a reason for departing from the APA, but also a doctrinal home once they left, for the administrative common law was part of a much larger edifice of federal common law. Precisely because so much federal common law existed, Louis Jaffe was able to organize his *Judicial Control of Administrative Action* (a work accurately described by Judge Posner as the “*summa theologica* of this era of administrative law scholarship”) around the basic theme that, in the words of Dean Daniel Rodriguez of the University of San Diego, “courts *ought* to use their federal common law powers to scrutinize administrative action.” Jaffe’s theme did not raise eyebrows in the era of New Federal Common Law, because the power of federal courts to fashion judge-made law was then seen as not only untroubling, but commendable. Administrative common law would flourish in that environment, and the APA would languish.

### The Decline and Fall of the Administrative Common Law

Since at least with Justice Powell’s influential dissent in *Cannon v. University of Chicago*, 441 U.S. 677, 730 (1978), the New Federal Common Law has been receding into history. Federal judges are less “eager” to be federal law-givers and are devoting renewed attention to the traditional limits on their powers to act as common-law judges. This change has had profound effects across the law. Private rights of action are now seldom implied into statutory silence; whole fields of state law are no longer converted into federal law based only on a jurisdiction statute. The shift is now being felt in administrative law.

As previously mentioned, *Darby v. Cisneros* is one of the best examples of a transition between judge-made law and statutory law. Another recent example is *Dickinson v. Zurko*, 119 S.Ct. 1816 (1999). In *Zurko*, the Supreme Court considered the Federal Circuit’s long practice of reviewing decisions of the

Patent and Trademark Office under a “clear error” standard, which, the Federal Circuit acknowledged, was a “common law” standard. As in *Darby*, the Supreme Court confronted an entrenched common law rule and rejected it in favor of the APA. Moreover, even the differences between *Darby* and *Zurko* show a continuing erosion in administrative common law. For in *Zurko*, the circuit court at least tried to reconcile its standard with the APA: The court relied on a savings clause in the APA that preserves “additional requirements . . . recognized by law,” 5 U.S.C. § 559, and held that this savings clause could preserve a more demanding standard of review in judge-made law prior to the APA. Though more accommodating to common law than the Supreme Court would allow, the Federal Circuit’s reasoning nonetheless showed far more attention to the APA than, for example, that shown by the lower court in *Darby*, which ignored the APA entirely even though the party trying to avoid the common law exhaustion doctrine made the statute his lead argument in briefing. The *Zurko* litigation demonstrates that even defenses of administrative common law are now litigated within the terms of the APA.

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### No true fan of judicial restraint should be enamored of the opinion in *Chevron*.

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Other examples of administrative common law can be seen in the ripeness doctrine and in the *Vermont Yankee* decision, both of which I have detailed my law review article. But the example with the most importance to modern administrative law is the *Chevron* doctrine.

No true fan of judicial restraint should be enamored of the opinion in *Chevron USA v. NRDC*, 467 U.S. 837 (1984), for it provides one of the best examples of pure judicial lawmaking. The *Chevron* Court did not trouble itself to consider the APA or any other statutory

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<sup>4</sup> See *SEC v. Cogan*, 201 F.2d 78, 87 (9th Cir. 1951).

<sup>5</sup> See, e.g., *Velasquez-Tabir v. INS*, 127 F.3d 456, 458 n.9 (5th Cir. 1997); *DuBois v. USDA*, 102 F.3d 1273, 1284 (1st Cir. 1996); *Smith v. Office of Civilian Health & Med. Program of the Uniformed Serv.*, 97 F.3d 950, 955 (7th Cir. 1996); *Stupak-Thall v. United States* 70 F.3d 881, 886 (6th Cir. 1995) (all citing § 706 as requiring de novo review on issues of law).

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authority; it justified its ruling with case law and its own assessment of the policy reasons (agency expertise and democratic accountability) for preferring agency interpretation over judicial interpretation. To leave no doubt as to its method, the Court even relied on Roscoe Pound's *The Spirit of the Common Law*.

*Chevron* was an APA case, so any attempt to justify its rule should begin with the APA. The first sentence of § 706 of the APA requires a reviewing court to “decide all relevant questions of law” and to “interpret constitutional and statutory provisions.” In the years immediately after the APA was enacted, courts routinely interpreted this language as an “explicit” command that “questions of law are for the courts rather than agencies to decide.”<sup>4</sup> Surprisingly enough, even after *Chevron*, federal appellate courts that focus on the APA rather than on administrative common law continue to read § 706 as requiring *de novo* review on issues of law.<sup>5</sup>

The legislative history of the APA also leaves no doubt that, as Representative Francis Walter (the Chairman of the House Subcommittee on Administrative Law and author of the House Committee Report on the APA) explained to the House just before it passed the bill, § 706 “requires courts to determine independently all relevant questions of law, including the interpretation of constitutional or statutory provisions.” Even Justice Scalia, who otherwise defends *Chevron*, has noted that the 79th Congress was laboring under “the quite mistaken assumption that questions of law would always be decided *de novo* by the courts.” But if Congress enacted that assumption into law with § 706, what power do courts have to find the decision “mistaken”?

A proper analysis of the type of issue presented in *Chevron*—a challenge to an agency legislative rule as inconsistent with the agency's statute—begins with a frank acknowledgment that the APA does indeed require courts to decide all issues of law. That does not end the matter, however, because an agency may have a general delegation to make substantive rules. The APA itself equates rulemaking with the power to “prescribe law.” Thus, even a court reviewing legal issues *de novo* must take account of the agency's substantive rulemaking power, and one quite plausible interpretation of such a power is that it allows an agency to “fill in the details” where other portions of the statute are silent or ambiguous. As Judge Posner notes, statutory authorizations for agencies to make substantive rules are like administrative “necessary and proper” clauses.

In *Chevron* itself, the EPA had a general delegation to create substantive rules, and the government's brief explicitly relied on that delegation as the source of the

agency's power. Furthermore, the *Chevron* Court described the EPA as “an agency to which Congress has delegated *policymaking responsibilities*,” and the Court has since made clear that “policymaking responsibility” flows from a substantive rulemaking power; see *Martin v. OSHRC*, 499 U.S. 144, 157 (1991). If the *Chevron* Court did not explicitly limit its holding to cases involving substantive rulemaking, the Court can be excused because of the terrible briefing on the issue—the respondents mentioned the standard of review only in a footnote *conceding* that an agency is entitled to deference in interpreting its statute unless the meaning of the statute is clear. Thus, given the context of the case, *Chevron* provides an incredibly weak basis for a general principle of deference that defies the plain command of § 706 of the APA.

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**Reconciling *Chevron* with the original meaning of the APA will not produce a different result in every case.**

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Reconciling *Chevron* with the original meaning of the APA will not produce a different result in every case. Where an agency has properly exercised a rulemaking power (as in *Chevron* itself), reviewing courts will have limited power to overturn the agency's rule: The court's power to “say what the law is” will be effectively limited by the agency's congressionally conferred power to make the law. But there are cases where the statutory and common law approaches diverge. One example is the current circuit split on whether agency interpretative rules are entitled to *Chevron* deference. Fidelity to the original meaning of APA would dictate *de novo* review; but the reasoning of *Chevron* might suggest deference. (Other examples of differences are considered in my longer article in the *Texas Law Review*.)

How any of these issues will be resolved is less important than the approach taken by the courts. If the courts regard these as matters to be resolved solely by reference to their own precedents and their own notions of good policy, then they will be taking a step back to the theory of the New Federal Common Law and undermining important limitations on the judiciary's role in the constitutional system. If, as the trend has been, they decide these issues with renewed respect for the work of the 79th Congress, they will be continuing the modern renaissance of the APA and restoring traditional restraints on federal judicial power. ▲

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# Member News

**Peter M. Shane** is the Fall 1999 Harold Gill Reuschlein Distinguished Visiting Professor of Law at Villanova Law School, where he is, of course, teaching Administrative Law.

The University of Louisville hosted a conference on teaching administrative law organized by Professor **Russell Weaver** at which papers were presented by Professors **Sidney Shapiro, William Funk, Craig Oren, John Reese, Charles Koch, Bill Andersen, Daniel Rodriguez, Yvette Barksdale, Ron Levin, Peter Strauss, Mark Seidenfeld, and Tom Sargentich.**

**John Holmes**, Administrative Law Judge at the U.S. Department of Labor, continues to review books for *The Federal Lawyer*, the magazine of the Federal Bar Association. Over the past year he reviewed *Partners in Power: The Clintons and Their America* by Roger Morris, which Holmes concluded became a “*National Enquirer*- style exposé billed as ‘investigative reporting;’” *Out of Order: Arrogance, Corruption and*

*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 February 14.*

*Incompetence* by Max Boot, a critique of the judicial establishment; and *No Contest: Corporate Lawyers and the Perversion of Justice in America* by Ralph Nader and Wesley J. Smith, which Holmes found “heavy going.”

**Randy May** has left Sutherland, Asbill & Brennan to become Senior Fellow and Director of Communications Policy Studies at The Progress & Freedom Foundation, a non-partisan think-tank. His work there will be primarily in the area of communications and Internet policy. Coincident with this change, he is also going to be writing a monthly opinion column for the *Legal Times* (and some of its associated papers) concerning regulatory affairs and administrative law issues. Randy has also recently published two short stories: “Hamneggs, beefsteak-gravy” in the Spring 1999 number of *Connections*, a literary magazine, and “The Day The Jay Died” in the August 8 edition of the *Raleigh News and Observer*. ▲

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