Administrative & Regulatory Law News

Section of Administrative Law & Regulatory Practice

Vol. 40, No. 2 American Bar Association Winter 2015

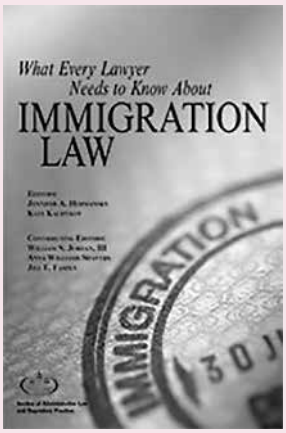
2014 Administrative Law Conference Highlights

Also In This Issue

What Every Lawyer Needs to Know About Immigration Law

by Anna Williams Shavers, Jennifer Hermansky, Jill E. Family, Lillian Katherine Kalmykov, William S. Jordan III

This practical guide provides legal practitioners with tips on issues that they may encounter when representing clients that may necessitate an examination of immigration-related issues. The book is meant to provide attorneys working in various areas of law with enough information to identify problematic immigration issues, counsel their clients accordingly and if the matter is advanced to know when to advise the client to consult with immigration counsel. It will also introduce attorneys to the myriad of agencies involved in the immigration process. Given the many ways in which immigration law can affect a single individual as well as large corporation, most lawyers will encounter a client needing immigration law advice. Yet for the non-specialist, immigration law can be daunting, particularly because it is governed by a complex mix of statutes, regulations, and federal and administrative court guidance—as well as by adjudicatory policies from multiple administrative agencies. Thus, it is important for lawyers to understand how best to spot immigration issues for clients, and when to involve an immigration attorney for assistance with a client. This book was written by immigration law specialists whose insights, guidance, and practice tips can offer help in understanding these issues.



$99.95 List Price
84.95 ABA Member Price
$79.95 Sponsor Member Price
ISBN: 978-1-62722-543-4
Product code: 5010080
2014, 562 pages, 6x9

To order, visit **www.ShopABA.org** or call the ABA Service Center at 1.800.285.2221.

Chair's Message

Anna W. Shavers

In October, we had an extremely successful Fall Conference. Our meeting co-chairs, Carol Ann Siciliano and Andrew Emery, put together a fabulous program. I want to thank them for all of their hard work. The program was exciting! The most difficult task the attendees had was to choose between all of the rich selections. For example, a new session, Rulemaking 102, was added to build on the Rulemaking 101 session typically held at the Spring Institute; in another session, the valuable work of the Administrative Conference of the United States (ACUS) was critiqued by a panel of federal judges.

The programs addressed many hot topics such as the celebration (or perhaps for some the lamenting) of the 30th anniversary of *Chevron*, the future of guidance documents, and the implications of international activities and rulemaking. We also had many panels on basic ad law topics such as the Regulatory Flexibility Act and the role of agency counsel, and of course our ever popular Developments presentations. In addition to their hard work producing the quarterly Administrative Law Review, our Washington College of Law volunteers helped to make this conference more enjoyable for our attendees. We also provided some time for socializing and celebrating at the Annual Section Dinner and Reception, where we also honored our award winners featured in this issue.

To top it all off, along with the valuable programs, we had the opportunity to meet up with other administrative lawyers. Other lawyers like you, the power behind the throne. Remember, "Administrative Law Rules."

We are proud of the tremendously diverse group of lawyers from government, private practice, and the academy that make up our Section. We enjoy the job we do wrestling with important questions, sharing information and insight, and spending time with the many friends we have made in the process. It makes membership in the Section quite rewarding. If you are not already a member, we hope, after participating in the Fall Conference, you will join us.

The indispensable Anne Kiefer, Section Director, ably assisted by Angela Petro and Alisha Dixon, makes the whole thing go, handling the thousands of day-to-day details. And we are most grateful for the crucial financial support provided by our generous sponsors.

As we look forward, there are many opportunities for our members to get involved. Watch for announcements about the 11th Annual Spring Institute to be held in Washington, DC April 23-25, 2015, at the Washington Convention Center; the Section Spring Conference held April 30-May 2, 2015, in Orlando, FL, and the 10th Annual Homeland Security Law Institute held August 27-28, 2015, at the Hyatt Regency Washington on Capitol Hill Washington, DC.

Please feel free to contact me to express ideas for section programs and inquire about opportunities to get more involved. annashavers.aba@gmail.com.

Anna W. Shavers

Please see the 2015 Awards criteria on pages 39–40 for the Section's Annual Awards to be conferred at the 2015 Fall Administrative Law Conference, October 29-30, 2015, Washington, D.C. **Save the date for the conference!** And please send your nominations for any of these awards to Anne Kiefer, Section Staff Director.

Front cover photo:
Matthew P. Downer, Vanderbilt University Law School, accepting the 2014 Gellhorn-Sargentich Law Student Essay Award from Section Chair Anna Shavers for "Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of Alaska Hunters."

Developments in Administrative Law and Regulatory Practice 2013

2014 Issue Coming Soon!

By Jeffrey S. Lubbers

Available as an e-book, this 15th Volume of "Developments in Administrative Law and Regulatory Practice," 2013 includes the most current developments in the field, beginning with four main cross-cutting chapters, and including additional chapters on substantive practice areas.

1) Adjudication

* Judicial Developments
* Administrative Developments

2) Constitutional Law and Separation of Powers

* Supreme Court 2012 Term
* Supreme Court 2013 Term
* Interesting D.C. Circuit Case

3) Judicial Review

* Judicial Developments Involving Scope of Review Doctrines
* Judicial Developments Involving Access to Courts

4) Rulemaking

* Judicial Developments
* Administrative Developments
* Legislative Developments

5) Substantive Practice Areas

* Government Information and Privacy
* Antitrust
* Communications
* Education
* Homeland Security
* Intergovernmental Relations

$59.95 List Price
$49.95 ABA Member Price
FREE Sponsor Member Price
978-1-62722-682-0 Product code: 5010081
July 2014, 132 pages, 6x9

To order, visit **www.ShopABA.org** or call the ABA Service Center at 1.800.285.2221.

ABA Defending Liberty Pursuing Justice

Table of Contents

Administrative & Regulatory Law News

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

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

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

Nonmembers of the Section may subscribe to this publication for $28.00 per year or may obtain back issues for $7.00 per copy. To order, contact the ABA Service Center, 321 North Clark Street, Chicago, IL 60610, Tel. 800/285-2221.

Towards a Fairer Terrorist Watchlist

Shirin Sinnar[*]

In the scope of a year, the legal terrain regarding terrorist watch lists has shifted dramatically. For over a decade, the government has used the "No Fly List" to summarily bar certain individuals deemed terrorist threats from flying on U.S. airliners or over U.S. airspace. Others have been subjected to rigorous scrutiny at airports and land borders. Federal courts dismissed several post-9/11 constitutional challenges to watchlists on jurisdictional or other preliminary grounds. But in 2014, two district courts in the Ninth Circuit ruled that the bare procedures available to challenge one's No Fly List status violated due process. The government, which had already lost two appeals in one case (*Ibrahim v. DHS*) and a third appeal in another (*Latif v. Holder*), chose not to appeal either decision. Outside the Ninth Circuit, too, courts asserted themselves. In October, a district court in the Eastern District of Virginia (*Mohamed v. Holder*) refused to dismiss a No Fly List plaintiff's case despite the Attorney General's declaration that state secrets should prevent its adjudication.

These decisions are long overdue. For years, individuals have been barred from flying on essentially the government's say-so—even U.S. citizens stranded overseas with no other realistic way of returning to the United States. In 2012, 500 of the 21,000 people on the No Fly List were reportedly U.S. citizens. For many, the inability to fly to, from, or over the United States resulted in lost job opportunities, prolonged separation from spouses and children, and the stigma of being branded a terrorist too dangerous to fly.

Under existing procedures, a traveler who is blocked from flying or who faces unusual scrutiny can file a complaint with the Department of Homeland Security's Traveler Redress Inquiry Program (DHS TRIP). If DHS TRIP determines that the incident was due to an exact or near match to a watchlist, it forwards the complaint to the FBI's Terrorist Screening Center (TSC), the entity that maintains the consolidated terrorist database used to generate watchlists for various agencies (such as the Transportation Security Administration's No Fly List). The TSC reviews the complaint in consultation with the intelligence agencies that originally requested that the person be listed. Eventually, the individual receives a letter notifying her that the review of her complaint is complete—without informing her whether she is or was on any list, the reasons for any such inclusion, or whether corrections were made. Given this opaque process, individuals seeking to contest their possible inclusion on a watchlist face the impossible task of proving a negative—that they do not threaten national security—while completely in the dark as to any accusations against them.

Latif v. Holder

The most significant case triggering reform is *Latif v. Holder*, an ACLU suit in the District of Oregon brought by thirteen U.S. citizens and legal permanent residents barred from flying. In 2013, Judge Anna Brown made the threshold determination that placement on the No Fly List implicated liberty interests protected by the Due Process Clause. This past June, the court further ruled that existing procedures to contest one's placement on the list were "wholly ineffective" and ordered the government to fashion new, constitutionally adequate procedures. *Latif v. Holder*, 2014 WL 2871346 (D. Or. June 24, 2014). To satisfy due process, the court held, the plaintiffs must receive notice of their No Fly List status and a statement of reasons that would enable them to submit responsive evidence. The court further suggested that, should classified evidence be involved, the government could submit unclassified summaries of its evidence or disclose classified information to counsel cleared to review it.

In response, the government promised to revise its redress procedures following a six-month interagency review. It suggested that it would apply the new procedures not just to the *Latif* plaintiffs but to an unspecified, broader class of individuals barred from flying. The court set an expedited timetable with respect to the *Latif* plaintiffs themselves, who had already waited four years since filing their claims. Complying with this schedule, the government informed the thirteen plaintiffs of their No Fly list status in October and supplied statements of reasons (with varying levels of detail)—a momentous development in light of the government's longstanding refusal to confirm or deny a person's inclusion on the list. If any plaintiffs remain listed when the government makes its final determinations early in 2015, they will undoubtedly return to court to challenge the adequacy of the government's newly applied procedures.

The Hard Questions

Finding a due process violation was a substantial step, but only the first one. The harder questions pertain to just how much process is actually required—especially at a time when national security officials are sounding the alarm over Americans traveling abroad to join terrorist groups. Policymakers designing new watchlist redress procedures face at least five crucial questions, some of which the *Latif* court and others will eventually confront.

First, how broadly should new procedures apply? Thus far, the government has said little about whether it will limit new procedures to U.S. citizens, legal permanent

[*]Shirin Sinnar is Assistant Professor of Law, Stanford Law School.

residents, individuals with substantial relationships with the United States, or other classes of individuals. Non-citizens may suffer serious deprivations from No Fly List placement. Indeed, in *Ibrahim v. DHS*, the Ninth Circuit ruled that a Malaysian woman who had studied at Stanford before being blocked from flying could assert constitutional claims based on her "significant voluntary connection" to the United States; the district court, five months before *Latif*, went on to find a due process violation in her case. Yet as a practical matter, the larger the pool of eligible individuals, the more the government will resist robust redress procedures. (And as a constitutional matter, those with more attenuated relationships with the United States will have a harder time convincing courts that their interests push the *Mathews v. Eldridge* balance in their favor).

Second, who should make the final decision in the revised administrative redress process? Currently, the Redress Office of the TSC, the agency that decides whether individuals meet the standard for inclusion in the consolidated watchlist, evaluates complaints from watchlisted individuals. But a more independent decision-maker—perhaps a redress board of Justice Department officials outside the TSC—could offer a somewhat more neutral perspective than TSC analysts strongly incentivized to err on the side of adding a name to the watchlist rather than deleting or omitting one.

Third, how much evidence should an individual be able to access when the government relies on classified or sensitive information? Can substitute procedures supply adequate notice when such information is denied? Courts have now wrestled with similar questions in terrorism prosecutions (using the Classified Information Procedures Act), in Guantanamo habeas detainee litigation, and in civil suits by charities contesting their designation as terrorist organizations. They have experimented with permitting unclassified summaries of evidence, disclosure to specially cleared counsel, and other imperfect but pragmatic compromises. Recent proposals to create "public advocates" to argue before the Foreign Intelligence Surveillance Court offer another model; perhaps specially designated internal advocates for watchlisted individuals could point out shortcomings in the government's case, especially where the individual in question is unrepresented or where the government claims that even cleared counsel cannot access certain evidence.

Fourth, who would bear the burden of proof in the administrative process? Would an individual on the No Fly List be presumed to meet the standard, and bear the burden of overcoming that presumption, or would the TSC have to "prove" its case to the decision-maker?

Fifth, under what standard of review should a court review the watchlist determination on appeal? Could a court reassess the determination *de novo*, in light of the security-driven incentives of executive decision-makers, or would it be bound by an abuse of discretion standard that defers to those officials' security expertise? Especially if the administrative decision-makers are officials within mission-driven national security agencies, due process may require more robust judicial review than in administrative contexts where agency missions are relatively aligned with claimants' own interests.

Three Broader Principles

Beyond the immediate task of establishing a new redress process, policymakers, courts, and the public ought to keep three broader points in mind. First, the fairness of procedures to contest watchlist status intersects with the substantive standards for listing individuals in the first place. In recent years, security agencies have lowered the substantive thresholds for watchlisting individuals; to the extent that these standards are inappropriately low, riddled with exceptions, or disconnected from the core threats that they were intended to address, then tightening these standards at the front end would reduce the demand for back-end redress. Recurrent allegations that FBI agents threaten individuals with watchlisting to coerce them into becoming government informants lends support to the idea that No Fly list standards have strayed from their original purpose of averting true threats to civil aviation.

Second, policymakers and courts should question the premise of the No Fly List itself: that certain individuals who are not charged with any crime are nonetheless too dangerous to fly under any circumstances. Is it truly the case that *no* set of extra security procedures, especially with respect to U.S. citizens and residents, could sufficiently mitigate the threat posed? The government has sometimes granted "one-time waivers" allowing Americans abroad to fly back to the United States, especially after they filed suit; in such cases, the government conditioned air travel on special security measures, such as advance submission of travel itineraries and extra screening (and perhaps also seated the individuals next to undisclosed federal air marshals). Even for individuals who are judged to meet the standards for inclusion on the No Fly List, measures short of total air travel bans might be available without compromising security.

Third, terrorist watchlists *beyond* the No Fly List also create substantial harm to U.S. individuals and communities. Thousands of Americans experience intrusive scrutiny and lengthy detentions as a result of traveler watch lists, such as those used by U.S. Customs and Border Protection to screen returning travelers at U.S. borders. Repeated encounters with law enforcement officers at airports, borders, and other contexts—even when they do not result in denial of entry or boarding—impose stigma and foster distrust in minority communities, no less than stop-and-frisk detentions or traffic stops on streets and highways. Although the court decisions currently forcing the government's hand principally concern the No Fly List, they provide an opportunity to reevaluate fairness with respect to traveler watchlists as a whole.

The Section warmly thanks the distinguished judges who participated in the panel giving perspectives from the Federal bench on the role of the Administrative Conference of the United States (ACUS). Pictured left to right, with panel moderator Paul Verkuil, ACUS Chairman, are Hon. S. Jay Plager, Hon. Patricia McGowan Wald, Hon. Stephen F. Williams, and Hon. John M. Walker.

David Pritzker, Deputy General Counsel, ACUS, accepts the Mary C. Lawton Award for Outstanding Government Service from John Cooney, Co-Chair of the Awards Committee, and Hon. Paul Verkuil, Chairman, ACUS.

Remarks of Nicholas R. Parrillo,* Accepting the Section's 2014 Scholarship Award for *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*

Thank you, Ron, for that kind introduction. And thank you to the Section for this award. I admire the Section for maintaining such a vital dialogue between academics, agency personnel, and the private bar. So I'm delighted that the Section has decided to recognize my book in this way. I've been asked to give some remarks about the book, which I'm happy to.

In America today, the income of a public official consists of a salary. But in the 1700's and usually far into the 1800's or early 1900's, the income of an official often consisted, largely or entirely, of rewards for doing particular tasks. Judges received fees for transactions in the course of litigation. Prosecutors received a fee for each conviction. Tax collectors received a percentage of the evasions they uncovered. Naval officers received a share of the value of the ships they captured. Police officers got rewards for arresting suspects or recovering stolen property. Clerks who decided immigrants' applications for citizenship had a fee for every grant, as did federal land officers who decided settlers' applications for homesteads. Government doctors who decided veterans' applications for pensions had a fee for every application. Jailors made a living selling goods and services to their inmates, while managers of penitentiaries took a percentage of the proceeds from inmates' forced labor. Even diplomats could lawfully take a "gift" from a foreign sovereign upon successfully negotiating a treaty.

Over the course of the 1800's and early 1900's, American legislators abolished all these arrangements, one by one, resulting in the norm of fixed salary compensation for public officials that we now take for granted. My book aims to describe the old profit-seeking regime and to explain how it was replaced. The book covers numerous government functions, at the federal and state levels, over more than a century. The reasons for the transformation were multiple and complex, and I can't summarize them all here. But I can give you some of the most important points.

Nicholas R. Parrillo, Professor of Law at Yale, accepts the Award for Scholarship in Administrative Law from Ronald Krotozynski, Vice Chair of the Awards Committee, and Section Chair Anna Shavers.

The government functions covered in the book can be divided into two categories, and we can better understand the "salarization" of these functions if we think in terms of the two categories. The first category consists of services that people seek from the government, like processing applications or granting benefits. The second category consists of services performed by the government that people are likely to resist—that is, enforcement functions, like detecting tax evasion or prosecuting suspects. I'll devote the rest of my remarks to these two categories, in turn.

Let's start with the first category: services that people seek from the government. Consider some examples. One is the naturalization of immigrants. The nineteenth century was the great age of immigration to America. In the nineteenth century, if you came to the United States and wanted to become a citizen, you had to show that you met several criteria, including that you were "attached to the Constitution." Whether you met the criteria was decided by a state or federal court clerk who got a fee (provided for by law) for every application he granted.

A second example is homesteads. Homesteads were the most important government benefits of the nineteenth century. To get a homestead, you had to "cultivate" a section of public land for a set number of years. Whether you met the standards for cultivation

*Nicholas R. Parrillo is a Professor of Law at Yale, with a secondary appointment as Professor of History.

was decided by a federal officer who got a fee (provided for by law) for every homestead he granted.

As you might guess, these kinds of fees caused government officials to view the fee-paying claimants as their "customers." During the nineteenth century, American government was often renowned for customer service (strange as that sounds today!).

For instance, if you were a German immigrant in New York City in the 1840s, and you showed up at a clerk's office to apply to be a citizen, the clerks wanted your money. So they'd process your forms with lightning speed. They'd hire interpreters (on their own dime) to help you. They'd give you a volume discount if you showed up with a lot of other immigrants. And they'd give you the benefit of the doubt on whether you were "attached to the Constitution," even if you didn't seem to know much about the Constitution.

Now, I suspect you are asking: Isn't this just corruption? Well, not necessarily. If you define corruption as "illegal activity," then it wasn't corrupt at all, since the fees were established by statute. Now, to be sure, the fees pushed the officers to construe and apply vague statutory terms in ways that were generous to the fee-paying applicants. But Congress knew that the officials were generous in how they administered the statutes, and Congress clearly wanted it that way. So, if you define corruption as "officials departing from their mission as publicly defined by lawmakers," then—again—this fee-driven administration was *not* corrupt. It was what the lawmakers wanted.

Well then, why didn't this system survive? There were multiple reasons, but I'd like to flag what is perhaps the biggest one. The old system of customer-seller transactions would make sense only in an area of policy where one interest group (the customers) enjoyed overwhelming political dominance. Many areas of policy were like that in nineteenth-century America. But they became less so around the turn of the twentieth century, as more interest groups organized themselves and muscled their way into politics, resulting in the interest-group rivalry that we're accustomed to today.

For example, in naturalization, immigrants around 1900 were challenged by the first sustained nativist movement, which got naturalization decisions transferred to salaried officers, so as to sever the seller-customer bond between officer and immigrant. And in public-land policy, settlers around 1900 were challenged by the new conservationist movement, which got homestead decisions transferred to salaried officers, so as to sever the seller-customer bond between officer and settler.

In both these areas (and others), salaries made officials less customer-friendly. Salaried officials had less incentive to work quickly, and claimants now had to wait in long lines. Even more important, salaried officials no longer gave claimants the benefit of the doubt on whether those claimants met the statutory criteria for whatever benefit they were seeking. Proportionately fewer immigrants became citizens. Proportionately fewer settlers won homesteads. And so forth.

But this salaried regime, though alienating from the claimants' perspective, was more sensitive than the old customer-seller regime had been to interests besides those of the claimants, such as nativists who wanted to prevent dilution of their voting power, or conservationists who wanted to prevent depletion of the public domain. Defining the relationship of official to claimant as one between seller and customer proved to be too simple—too one-dimensional—for the modern political world of interest-group rivalry.

Let me now shift to the second of the two categories of government services: services that people are likely to resist. One example is criminal prosecution. District attorneys in most states, as well as the U.S. attorneys, were paid a fee for every conviction they won. Another example is taxation. At the federal level, the most important taxes in the nineteenth century were the tariff and the liquor and tobacco excises; for all these taxes, the enforcement officers would receive a percentage on the forfeitures they imposed. At the state and local level, the most important tax was a general property tax on all wealth; for this tax, the enforcers were commonly paid a share of the evasions they discovered.

These kinds of payments may strike us as barbaric—reminiscent of Roman tax farming. That is, we may assume they are the kinds of things that naturally fade away with the advance of civilization, like trial by battle, or sanguinary punishments.

But I don't think that explanation works. The reason is that American lawmakers for much of the 1800s authorized these kinds of payment *more and more* commonly (up until they finally did an about-face toward the end of the 1800s and abolished them). What was the initial and intense attraction that these payments held for nineteenth-century lawmakers, shortly before the payments were rejected?

To answer that, we need to look farther back—at how enforcement officers were paid before the 1800s, way back in the colonial period and the very early republic. In that earlier period, enforcement officers usually were paid nothing at all, or they were paid so little that money couldn't explain why they did their jobs. This was true for the old justices of the peace, the constables, the town tax assessors, etc. Officers like these were motivated to do their jobs because they each lived in a small, homogenous local community. Serving in an office was simply *something you did* as a member of that community. It wasn't that big of a deal, since most every office was part-time, and you normally served only for a short term, until one of your neighbors took over for you, at which point you went back to being just another member of the community. This meant that, even while you were serving as an officer, you thought of yourself as a member of the community first, and an officer second.

This model of law enforcement worked fine when the laws to

be enforced were supported by a relatively broad consensus within the community, so that enforcement was only necessary against occasional deviants. In other words, the model worked so long as government refrained from making demands that were out-of-phase with local community expectations.

But then, in the course of the 1800's, things changed. Legislators started to make much more ambitious and intrusive demands—demands that clashed with the expectations of numerous local communities. At the federal level, these demands included the extremely high tariffs that began with the Civil War, as well as the permanent excise taxes on liquor and tobacco, also beginning with the Civil War. Such demands also arose at the state level and in big-city governments. One example is the skyrocketing of property taxes in the mid-1800's to pay for new initiatives in public health, schooling, and elsewhere. Another example is in morals regulation. Liquor and gambling had always been subject to loose, local regulation, but it was only in the mid-1800's that states began trying to *prohibit* them entirely. Prohibition was a radical new measure, and extremely unpopular in some parts of every jurisdiction that tried it.

When legislators made these newly ambitious demands, they encountered an enormous problem. The traditional kinds of law enforcement officers—who were essentially community members motivated by community sentiment—would not enforce these new laws. And there lay the attraction of paying monetary rewards for enforcement. Imagine that you are a legislator, and you want an officer to enforce novel legislation while living and working in an area where many (perhaps most) of the people consider the legislation to be intrusive, unreasonable, outrageous, odious, and perhaps even an attack on their way of life. If you want an officer to enforce the law under these circumstances, you need to give that officer some kind of strong extrinsic motivation. Thus, as they imposed more ambitious legislative demands, nineteenth-century lawmakers increasingly paid for convictions, paid for forfeitures, and the like, in an effort to make modern legislation "stick."

But, after experimenting intensely with paying for enforcement by the task, American lawmakers concluded, from experience, that it was a bad idea. They concluded that, although the payments encouraged more *enforcement*, the public's actual *compliance* with law (measured, say, in tax receipts) did not improve, and might even diminish. Lawmakers concluded that achieving mass compliance with law through simple punishment and deterrence was practically impossible.

Their conclusions resonate with research today in the social psychology of law enforcement. Practically, a successful government needs to foster the voluntary compliance of its population—that is, legitimacy. Laypersons are more likely to respect the government and the law if they can attribute disinterested motives to the government. This is especially important when the content of the law itself isn't backed up by simple everyday morality, as modern legislation often isn't. When officials are paid for the amount of enforcement they do, these payments undermine the buildup of trust and voluntary compliance. Relatedly, paying by the task incentivizes officers to maximize the number of violations prosecuted, but modern regulatory and tax legislation creates such broad liability—and modern government's surveillance powers can so easily turn up evidence of technical noncompliance—that enforcement needs to be tempered by discretion.

This was exactly the issue in the late 1800s. When enforcing modern legislation, and using new surveillance powers, officers went after very large numbers of people for very small, technical violations. Although the violators were legally guilty, their violations were so small that the public began identifying more with the people accused than with the officers. Norms of compliance threatened to unravel. When lawmakers took enforcers off the profit motive, the idea was to make them *seem* selfless, and thereby get people to trust government more—even (or especially) as government's demands continued to grow more ambitious.

Panel on Flourishing or Flailing: The Future of Agency Guidance Documents and Policy Statements, with Aditi Prabhu, Mark Seidenfeld, Ray Ludwiszewski, and Connor Raso.

James W. Conrad, Jr. Principal, Conrad Law & Policy Counsel, Washington, DC, accepting Section Fellow Award from Joe D. Whitley, Last Retiring Chair, and Anna W. Shavers, Section Chair.

Many thanks are due the members of the Administrative Law Review *Editorial Board and Senior Staff for all they contributed to keeping the Fall Conference running smoothly. Pictured here (left to right): Professor Andrew F. Popper, Chair, Faculty Board, with Sarah Brown, Shantel Williams, Editor-in Chief Wenxi Li, Ashley Hudson, Kirsten Shiroma, Veronica Jae, Margaret Kim, Amber Lee, Aravind Sreenath.*

William S. Jordan III, Associate Dean for Academic Affairs, The University of Akron School of Law, accepting Section Fellow Award from Joe D. Whitley, Last Retiring Chair, and Anna W. Shavers, Section Chair.

Not pictured: The Section's Annual Volunteer Award was conferred upon Daniel J. Metcalfe, Contributing Editor, for his last decade's meticulous work on the Administrative & Regulatory Law News.

Auer Deference in Practice

By Kevin Stack[*]

Auer deference has attracted increasing attention in administrative law circles. *Auer* deference refers to the doctrine traditionally associated with *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and now more frequently attributed to *Auer v. Robbins*, 519 U.S. 452 (1997), which states that a court must accept an agency's interpretation of its own regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* at 461. While the doctrine is the subject of a longstanding academic critique, attention to the doctrine has been piqued in recent years by Justice Scalia's announcement of his interest in abandoning *Auer* in his separate opinion in *Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1342 (2012); his prior statements of interest in reconsidering it; and Chief Justice Roberts and Justice Alito's statement of their interest in reconsidering the doctrine in their separate opinion in *Decker.* The attention is well-deserved. As statutory obligations are frequently specified by regulations, it is a matter of considerable interest which institution—the courts or agencies—has primary say over regulatory meaning.

At the Section's fall Administrative Law Conference, I organized a panel to provide an assessment of *Auer* from several different perspectives, including its history and development, its connection to background administrative law values, its role for agency lawyers, and its impact on representing regulated parties. On the panel, Amy Wildermuth (University of Utah) traced its evolution from the *Seminole Rock* decision into a free-standing doctrine based on her co-authored scholarship with Sanne Knudsen (University of Washington School of Law). *See* Unearthing *Seminole Rock* (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555718). Matthew Stephenson (Harvard Law School) spoke to the doctrine's connection to background values and doctrines in administrative law, including *Chevron* based on his co-authored scholarship with Miri Pogoriler. *See Seminole Rock*'s Domain, 79 Geo. Wash. L. Rev. 1449 (2011). Aditi Prabhu (Attorney-Advisor, Environmental Protection Agency) addressed the role of the doctrine for agencies. Scott Angstreich (Partner, Kellogg, Huber, Hanse, Todd, Evans & Figel) spoke to the impact of the doctrine for those representing regulated firms. As Ms. Prabhu's and Mr. Angstreich's views on *Auer*'s impact on practice are not readily available elsewhere, the following provides a summary of their remarks.

How Does *Auer* Deference Influence Agency Practices?

Aditi Prabhu[†]

What is *Auer* deference? As the Supreme Court first articulated in *Seminole Rock* almost seventy years ago, a court must defer to an agency's interpretation of its regulation unless it is plainly erroneous or inconsistent with the regulation. For agencies, it's a pun for "our" deference—the deference we get for interpretations of our own regulations. My remarks addressed the Why, When, and How of *Auer* deference: Why should agencies get such a high level of deference for these interpretations? When do agencies interpret their regulations? And how does *Auer* deference affect agencies—in what respects does it influence day-to-day decision-making and policy choices?

Why do agencies get a high level of deference for interpretations of their regulations?

The Supreme Court has not provided a clear articulation of the basis for *Auer* deference. But there are many reasons why affording such deference is sensible. From a doctrinal perspective, the congressional delegation of rulemaking authority encompasses interpretive authority. As an agency promulgates rules, it explains what they mean. This principle is enshrined in the Administrative Procedure Act, which directs agencies to include a statement of basis and purpose to accompany a final rule. As the drafters of regulations, agencies best understand their intent and original meaning.

Subsequent interpretations reflect the agency's growing expertise and experience. The agency administering a particular program is in the best position to understand how it works and how to address technical complexities. Agency interpretations are part of program implementation and involve core agency competencies

[*]Professor of Law, Vanderbilt Law School.
[†] Attorney-Advisor, Office of the General Counsel, U.S. Environmental Protection Agency. The views expressed here are those of the author only and do not necessarily represent those of the United States or EPA.

such as making policy judgments, reconciling competing considerations, and understanding programmatic consequences.

Functionally, the expectation that interpretations will be reviewed deferentially promotes predictability and encourages transparency. Unlike courts, agencies can consider the meaning of regulations before concrete disputes arise in their application. Deference encourages agencies to tell the public how they intend to apply regulations without significant concern about judicial reversal. Regulated entities can be confident that courts will uphold the interpretation, so they need not wait for judicial review to rely on an agency pronouncement.

When do agencies interpret their regulations?

Agencies don't just open the CFR and muse about what their regulations mean as a standalone, abstract exercise. Interpretations arise as the agency is figuring out how best to administer its regulatory regime and determining how regulations may apply to specific situations. The agency might be adapting old regulations to new technologies and emerging risks, or addressing unintended consequences of a new regulatory program.

Agencies interpret their regulations in a wide variety of contexts in implementing programs, resulting in statements at varying levels of formality and impact. They might provide general interpretations of their regulations in regulatory preambles, guidance documents, compliance manuals, and briefs filed during litigation. Additionally, agency employees at various levels provide specific interpretations in response to questions from regulated entities and the public and as part of adjudications, enforcement actions, permit issuance, and review of state applications to administer programs. Taking permitting as an example, every facility and situation is unique. EPA's regulations may explain what information permit applicants need to provide, which criteria the agency considers in reviewing the application, and how impacts to human health and the environment should be assessed. In applying these regulations to each factual scenario, the agency needs to consider what its requirements mean to determine if the permit applicant has met them and what permit conditions may be appropriate.

"At issue in Auer *Deference: As statutory obligations are frequently specified by regulations, it is a matter of considerable interest which institution—the courts or agencies—has primary say over regulatory meaning."*

How does the availability of *Auer* deference affect agency practices?

Does *Auer* deference matter? It is difficult to assess its practical impact because courts rarely spell out whether the standard of review was the pivotal factor in the outcome. Some empirical studies suggest that courts uphold agency actions under *Auer* and *Skidmore* at similar rates. In my view, the impact of *Auer* deference on agencies' routine decision-making is limited for three reasons.

First, you can't count on it. Given the nuances in the case law, there is no guarantee that the agency will receive *Auer* deference in a particular instance, so it is risky to rely on it. In reviewing agency interpretations, various courts have gone beyond the pure formulation of deference in *Seminole Rock* to consider the regulation's original intent and explanations in the preamble, scrutinize the underlying statute's language and purpose, and evaluate the consistency of the interpretation over time. Furthermore, only interpretive rules receive *Auer* deference, not policy statements, and agency guidances often contain a mix of the two.

Second, deference is just one of many considerations in an agency setting. *Auer* deference may provide agencies with a lot of options in the abstract, but many other practical considerations narrow the set of realistic choices for policymakers.

Some commentators have expressed concern that agencies can use interpretations to effectively rewrite rules or address critical issues without public participation. However, stakeholders are typically heavily involved in controversial guidance and interpretive rules. Agencies often voluntarily engage in public participation by soliciting comment or holding public meetings in the interest of transparency and to inform decision-making. And if an agency declines to do so, agency officials are likely to get a lot of negative pushback and political pressure from the regulated community or public interest groups. Given the considerations of good government and possible legal challenges, the norm is for agencies to provide a persuasive explanation of their reasoning. As a result, many of these interpretations would likely be upheld under a *Chevron*- or *Skidmore*-style review.

Others have suggested that agencies may have an incentive to promulgate vague regulations and subsequently take liberties when interpreting them, thereby hindering the goals of notice and comment rulemaking. However, agencies have a strong interest in writing clear regulations. Agencies can effectively enforce only clear regulations; otherwise, they risk running afoul of fair notice and due process considerations. Moreover, if agencies rely on interpretations too liberally, regulated parties will

object that the agency action was actually a legislative rule that should have been promulgated through notice and comment rulemaking. Furthermore, agencies don't have free rein to change their interpretations, as consistency is often a factor in how much courts defer in practice.

Interpretive rules are in the limelight this year as the Supreme Court takes on the issue of whether agencies need to undertake notice and comment rulemaking to change interpretations of their regulations. *Mortgage Bankers Association v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted*, 134 S. Ct. 2820 (June 16, 2014) (No. 13-1052). Although *Auer* deference is not formally before the Court in that case, agencies will surely be scrutinizing the decision for hints of the Court's future direction on interpretive rules.

Regulated Firms, *Auer*, *Skidmore*, and Court-Invited Amicus Briefs

Scott H. Angstreich and Cynthia Barmore†

Although agencies interpret their regulations through a variety of different means, amicus briefs invited by the courts of appeals pose particular challenges to regulated firms and their counsel. Unlike other agency interpretations, which typically form the legal background for litigation about what a regulation means, agency amicus briefs often arrive in the middle of litigation as an "exogenous" interpretive source.

At least anecdotally, courts of appeals have increasingly been requesting amicus briefs following the Supreme Court's reaffirmance in *Talk America* of the deference due to such briefs. Their value to the courts is readily apparent. As compared to primary jurisdiction referrals, invited amicus briefs allow the courts of appeals to obtain the agency's view quickly and thereby to resolve disputes among reasonable competing interpretations of the meaning of agency regulations. However, it is worth noting that, while a primary jurisdiction referral will (eventually) result in a reviewable decision of the agency itself, an amicus brief is written by the agency's general counsel. If the agency has not previously spoken to an issue — or the issue is currently pending before the agency — its general counsel may be unable to respond substantively to the court's request. This happened recently in a Third Circuit case, where the FCC's general counsel's office cited both reasons in explaining that it could not answer the court's questions. *See* http://goo.gl/4EP7an.

If the agency does answer the court's questions, the opinion in the amicus brief is highly likely to prevail. Since *Talk America*, there appears to be only one instance in which a court of appeals has rejected the position taken in an amicus brief it requested from the agency. In *Wilson v. Merrill Lynch & Co.*, 671 F.3d 120 (2d Cir. 2011), the Second Circuit invited the SEC to submit an amicus brief and the agency opined not only on the meaning of its rules, but also on the inadequacy of Merrill Lynch's disclosures under the rules. The Second Circuit rejected the agency's application of its rules and found the disclosures adequate. A divided panel on the Tenth Circuit recently refused to defer to an amicus brief that the Department of Justice, which had participated as an amicus in the district court, filed in the appellate court without an invitation. Both the majority and dissenting judges found the rule unambiguous, with the majority rejecting the DOJ's interpretation as contrary to the regulation's plain meaning. *See Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205 (10th Cir. 2014).

More commonly, a court of appeals that is not persuaded by the agency's interpretation in its amicus brief nonetheless reluctantly defers to that interpretation. One example is *Qwest Corporation v. Colorado Public Utilities Commission*, 656 F.3d 1093 (10th Cir. 2011), where the court was explicit that it was "reluctant to afford such solicitude to an agency's amicus brief and . . . would not necessarily reach the same result if not required to defer" by *Auer*.

In a sense, *all* deference by an appellate court to an agency's interpretation is reluctant. If the court would have come to the same conclusion on its own — or without according the agency's view any special weight because it is the agency's view (as opposed to the argument of a private party) — "deference" is not dictating the outcome. It is, at most, providing further confirmation of what the court independently concluded is the correct result. While *Auer* sometimes dictates the outcome, as in *Qwest*, courts of appeals often apply *Auer* simply as a shortcut to a result the court would have reached on its own, without giving any additional weight to the agency's view.

Recently, Justice Scalia has urged the Court to reverse *Auer*, and the Chief Justice and Justice Alito have indicated their willingness to consider such a change. If the Court eliminated

† Scott Angstreich is a partner at Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. Cynthia Barmore is a J.D. Candidate at Stanford Law School. The views expressed here are their own.

Auer, *Skidmore* would instead govern the courts of appeals' review of agency interpretations of their own regulations. The Ninth Circuit's recent decision in *Independent Training and Apprenticeship Program v. California Department of Industrial Relations*, 730 F.3d 1024 (9th Cir. 2013), gives some indication of the uncertainty that could result for regulated firms, at least in the short term.

There, the court refused to defer under *Auer* to the Department of Labor's interpretation of a rule in an invited amicus brief, finding that the new interpretation imposed too great a risk of unfair surprise for regulated firms that had relied on the Department's previous (broader) interpretation of that same rule. However, when it turned to *Skidmore*, the Ninth Circuit *accepted* the Department's new interpretation, finding it to be "the most persuasive construction," without expressing concern about the unfair surprise that "prevented" the court from deferring to that interpretation under *Auer*. The Ninth Circuit also found that "additional deference is warranted" to the Department's amicus brief under *Skidmore* because of the "thoroughness evident" in it.

Independent Training thus illustrates the relatively underdeveloped rules for applying *Skidmore*. The standard *Skidmore* formulation — which looks to the various "factors which give [the agency's interpretation] power to persuade" — provides little guidance about how it operates as a *deference* doctrine. If all *Skidmore* does is remind courts that agencies can be a source of persuasive arguments, it is not truly a deference doctrine. Nor does it make sense to view *Skidmore* as a form of "extra credit" for agency amicus briefs that are especially well done: persuasive arguments are persuasive on their own. Instead, if *Skidmore* is to be a deference doctrine, an argument must be deemed more persuasive *because* it comes from the agency, rather than from a private party, in much the same way that arguments found in a learned treatise carry additional weight due.

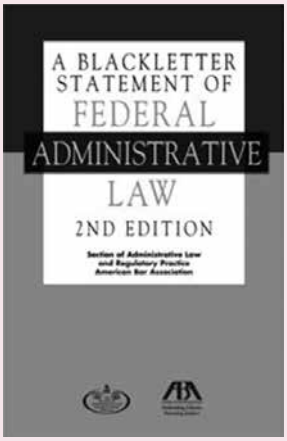
Considerable uncertainty would therefore likely attend a shift from *Auer* to *Skidmore*, making it more difficult for regulated firms to predict the force that an adverse or favorable agency interpretation will carry.

More than 600 people participated in the keynote "Developments in Administrative Law" panels at the 2014 Administrative Law Conference.

New Book Release From the ABA

A Blackletter Statement, 2nd Edition

Up-to-date guide summarizing the basic propositions of current federal administrative law



$34.95 List Price
$29.95 ABA Member Price
$24.95 Section Member Price

2013
Paperback
132 pages

A Blackletter Statement, 2nd edition has not only been updated, but also is better organized and more consistent in style and substance. This concise, up-to-date book articulates this important body of law with sufficient clarity and felicity that practitioners can effectively function within it. This edition includes:

Part I: Adjudication—covering from Due Process Requirements for a Hearing through Post-hearing Requirements.

Part II: Informal Rulemaking includes Applicability, Initiating Rulemaking, and more.

Part III: Scope of Review explores Standards of Review on Statutory Issues, Nonstatutory Legal Issues, and Issues of Fact and more.

Part IV: The Availability of Judicial Review of Administrative Action examines the Overview of Prerequisites to Judicial Review, Timing of Judicial Review, Reviewability, and Standing.

Part V: Freedom of Information, Sunshine, Advisory Committees covers the various associated acts.

Part VI: Government Management of the Administrative Process reviews the Scope, Congressional and Presidential Management of Agency Action and Statutory Requirement

ABA SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE

To order, visit **www.ShopABA.org**
or call the ABA Service Center at 1.800.285.2221.

ABA Defending Liberty Pursuing Justice

Supreme Court News

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

This Term, the Supreme Court has pending before it a long docket of cases with potentially important implications for administrative law. The Court already has heard argument in several of these cases, and many of the cases are highly anticipated by the administrative law bar. On the docket are questions involving the Affordable Care Act, *Chevron* deference, the non-delegation doctrine, regulation of power plants with billions of dollars on the line, notice and comment rulemaking procedures, administrative preclusion, and a host of other administrative law issues.

The Affordable Care Act and *Chevron* Deference

Perhaps the highest profile administrative law case in which the Court has granted certiorari this term is *King v. Burwell* (No. 14-114). At issue in *King* is the Internal Revenue Service's interpretation of the insurance "exchange" provisions of the Affordable Care Act ("ACA"). Section 1321 of the ACA grants tax credits to certain individuals who purchase health insurance through "State" exchanges. The IRS, however, interpreted the statute to also grant credits to individuals who buy insurance through the federal exchange. Below, the Fourth Circuit upheld the IRS's interpretation, finding the statute ambiguous at step one of *Chevron* and reasonable at step two. Thus, *King* has potential significance both for the Affordable Care Act itself and also in defining how *Chevron* should be applied—particularly with respect to how ambiguity is measured at step one of that doctrine.

Notice and Comment Rulemaking

In *Perez v. Mortgage Bankers Ass'n* (No. 13-1041, argued Dec. 1, 2014), the Court will take up an important question regarding the application of notice and comment rulemaking procedures under the Administrative Procedure Act. The D.C. Circuit has held that when an agency's interpretation of a statute becomes definitive enough, the agency must utilize notice and comment rulemaking procedures to change the interpretation—even if the interpretation was originally adopted using less formal procedures (such as an interpretative rule). The correctness of that doctrine is the issue before the Court.

Hazardous Pollutants and the Clean Air Act

Another high-profile case is *Michigan v. EPA* (No. 14-46), which the Court consolidated with two other cases (Nos. 14-47 and 14-49). In a series of actions that began in 2000 and have been up and down to the Court of Appeals several times, the EPA regulated mercury and other hazardous air pollutants from power plants that use coal and oil to produce electricity. The agency decided to proceed in two-steps: first, to determine whether to regulate (it said "yes"), and second, to actually establish the regulations. The EPA decided, however, that it would not consider regulatory costs at step one but only at step two. Numerous states, an electricity trade group, and coal suppliers' trade association unsuccessfully challenged that decision in the D.C. Circuit. Before the Supreme Court is the question: "Whether the Environmental Protection Agency unreasonably refused to consider costs in determining whether it is appropriate to regulate hazardous air pollutants emitted by electric utilities."

Non-Delegation

The Court has two cases on delegation this term—one relating to delegating legislative power, the other on delegating judicial power.

The case on legislative power is *U.S. Dep't of Transportation v. Ass'n of American Railroads* (No. 13-1080, argued Dec. 8, 2014). Under the well-known non-delegation doctrine, Congress cannot delegate regulatory power to an agency unless it provides an intelligible principle to guide the agency. A less well-known cousin of that doctrine is that Congress cannot delegate regulatory power to a private entity. That latter doctrine is at issue in the case before the Court. The Passenger Rail Investment and Improvement Act of 2008 directs the Federal Railroad Administration and Amtrak to jointly develop standards applicable to Amtrak and, if they cannot not agree, to utilize an arbitrator. The question is whether the Act is an unconstitutional delegation because Amtrak is a private entity.

The case on the delegation of the judicial power is *Wellness Int'l Network v. Sharif* (No. 13-935, argued Jan. 14, 2015). The Supreme Court has held that Article III prohibits bankruptcy courts, which are non-Article III courts, from hearing state law claims unless those claims "stem[]from the bankruptcy itself." The question in *Sharif* is whether a claim presenting state law issues relating to the scope of the bankruptcy estate stems from the bankruptcy, and thus, may be heard by the bankruptcy court.

Administrative Preclusion

Another potentially important case before the Court this term is *B&B Hardware, Inc. v. Hargis Industries, Inc.* (No. 13-352, argued Dec. 2, 2014). There, the Court will take up the question of whether agency determinations may have preclusive effect in subsequent civil litigation.

* Associate Dean and Professor of Law, S.J. Quinney College of Law, University of Utah.
** Professor of Law, S.J. Quinney College of Law, University of Utah.

In *B&B Hardware*, the Patent and Trademark Office's Trademark Trial and Appeal Board declined to register Hargis Industries' trademark. It did so based on its determination that the proposed mark could cause confusion with a mark previously registered by B&B Hardware. The Eighth Circuit, assuming that the Trademark Trial and Appeal Board's determination could have preclusive effect, ruled that there was no collateral estoppel because the issues in question were not identical.

Redistricting

The Court has two cases relating to legislative districting this Term. The first is *Alabama Democratic Conference v. Alabama* (No. 13-1138, argued Nov. 12, 2014). In 2012, Alabama drew legislative districts based on the 2010 Census. In doing so, Alabama maintained the same racial proportions that existed in the old districts. The question before the Court is whether drawing districts to maintain those racial proportions was lawful.

The second case is *Arizona State Legislature v. Arizona Independent Redistricting Commission* (No. 13-1314). In 2000, the people of Arizona amended their constitution to establish an independent Commission for drawing district lines. The question before the Court is whether assigning the districting power to the Commission violates the Elections Clause, which provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." The Court will also consider whether the state legislature has standing to challenge the Commission's constitutionality.

Review of Agency Determinations

There are several pending cases relating to the review of agency determinations. At issue in *Mach Mining, LLC. v. EEOC* (No. 13-1019, argued Jan. 13, 2015), is the enforceability of the Equal Employment Opportunity Commission's duty to try to resolve discrimination claims before bringing suit. Before filing a suit for an unlawful employment practice, the EEOC "shall endeavor" to stop the discrimination by "informal . . . conciliation." 42 U.S.C. § 2000e-5(b). The question in *Mach* is whether a court may dismiss a discrimination claim if it concludes that the EEOC's conciliation efforts were insufficient.

In *T-Mobile South, LLC v. City of Roswell* (No. 13-975, argued Nov. 10, 2014), the Court will address what is required under the Telecommunications Act of 1996 when a locality denies a cellular tower siting application. In this case, the city of Roswell, Georgia sent a letter to T-Mobile simply stating that its application had been denied. Roswell subsequently provided a copy of the city council meeting minutes as the explanation for the denial. However, the Telecommunications Act of 1996 requires such denials to be provided "in writing." The Eleventh Circuit held that Roswell's action was sufficient under the Act, and the Supreme Court will now review that determination.

The question in *Teva Pharmaceuticals USA v. Sandoz* (No. 13-854, argued Oct. 15, 2014) is whether the courts of appeals should review factual findings made by a district court in support of its construction of a patent-claim term de novo or for clear error.

In *Kerry v. Din* (No. 13-1402), the Court will address the reviewability of visa denials. An alien cannot seek judicial review of denial of a visa. To avoid this limitation, Din, a U.S. citizen, brought suit to challenge the denial of a visa to her spouse, who is not a U.S. citizen. The question is whether Din may seek this review. The Court will also decide whether Din has a liberty interest in the granting of a visa to her spouse.

In *Holt v. Hobbs* (No. 13-6827, argued Oct. 7, 2014), the Court will review the sufficiency of the Arkansas Department of Corrections' regulations prohibiting inmates from growing beards. The challenge is by a Muslim inmate who claims that the beard limits violates the Religious Land Use and Institutionalized Persons Act. At oral argument, Arkansas offered three rationales to justify its policy, each of which was met with sharp questioning from the Court: that the beard length limit is necessary to prevent inmates from concealing contraband, that the limit is needed to be able to track inmates within the system, and that the rule is necessary because inmates are mischievous.

Antitrust

The reach of the state-action exception to federal antitrust laws is at issue in *North Carolina Board of Dental Examiners v. Federal Trade Commission* (No. 13-534, argued Oct. 14, 2014). Under the state-action doctrine, federal antitrust laws do not apply to anticompetitive actions undertaken by the states in their sovereign capacity. But that immunity generally does not extend to actions performed by private entities acting pursuant to a delegation of state power. The question in *North Carolina Board of Dental Examiners* is whether the immunity should extend to a state regulatory board when a majority of the board's members are private market participants who are elected to their board positions by other market participants.

Tax Cases

In *Maryland State Comptroller of the Treasury v. Wynne* (No. 13-485, argued Nov. 12, 2014), the Court will decide whether the dormant Commerce Clause—which prohibits states from enacting legislation that unduly

burdens interstate commerce— bars a state from taxing its residents for income earned in another state to the extent that the other state already taxes that income.

Direct Marketing Assoc. v. Brohl (No. 13-1032, argued Dec. 8, 2014) involves the Tax Injunction Act and its prohibition on federal courts enjoining the state "assessment, levy or collection of any tax where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341. The question before the Court is whether this prohibition forecloses federal jurisdiction over a suit brought by non-taxpayers challenging notice and reporting requirements of a state law that does not impose a tax, but rather, is used in state tax administration.

Statutory Interpretation

The Court has before it numerous cases involving statutory construction this term, many of which will have implications for how agencies carry out their business.

A potentially important energy law case in *Oneok, Inc. v. Learjet, Inc.* (No. 13-271, argued Jan. 12, 2015). There, the Court will address whether the Federal Energy Regulatory Commission's ("FERC") exclusive jurisdiction over wholesale natural gas prices preempts state antitrust claims arising out of alleged price manipulation. Under the Natural Gas Act, FERC regulates wholesale gas rates as well as practices that affect rates. The question is whether the Ninth Circuit erred in holding that FERC jurisdiction did not foreclose state law claims because retail, as opposed to wholesale, natural gas prices were also implicated.

Integrity Staffing Solutions v. Busk (No. 13-433, argued Oct. 8, 2014) raises a question about compensation under the Fair Labor Standards Act. The Act requires employers to pay at least a minimum hourly wage and to pay overtime when an employee works more than 40 hours in a week. But these provisions do not apply to time spent on activities that are performed "postliminary" to an employee's primary job responsibilities. The question for the Court is whether the time warehouse employees spend in security screening after their shifts is postliminary.

At issue in *Department of Homeland Security v. MacLean* (No. 13-894, argued Nov. 4, 2014) are limits on the power to fire federal employees. Robert MacLean, then an air marshal for the Transportation Security Administration, disclosed information about the deployment of air marshals that he believed demonstrated the deployments were unlawful. The TSA dismissed MacLean on the ground that this disclosure violated TSA regulations. Under 5 U.S.C. § 2302(b)(8)(A), an employee cannot be terminated for disclosing information that he believes shows a violation of law, unless that disclosure is "specifically prohibited by law." The question is whether the TSA's regulations constitute a specific prohibition by law.

Mellouli v. Holder (No. 13-1034, argued Jan. 14, 2015) presents the question whether non-citizens are removable based on drug paraphernalia possession convictions. The issue is the scope of federal immigration laws, which provide that non-citizens may be removed for violating "any law relating to a controlled substance." In such cases, does the government have to prove a nexus between the paraphernalia and a controlled substance?

Yates v. United States (No. 13-7451, argued Nov. 5, 2014) involves the destruction of fish. The captain of a commercial fishing boat ordered his crew to throw overboard fish they had caught after a federal official determined that they were undersized. The question is whether, by doing so, the captain violated 18 U.S.C. § 1519—which makes it a crime when a person "knowingly . . . destroys [or] conceals. . . any . . . tangible object" with the intent to obstruct an investigation.

Alabama Dep't of Revenue v. CSX Transportation, Inc. (No. 13-553, argued Dec. 9, 2014) involves the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"). Alabama adopted a tax regime that applies to diesel fuel used by railroads but exempts that fuel when used by road and water carriers. The question is how to construe the phrase "comparison class" under the 4-R Act, and whether only the specific Alabama tax provision in question should be considered to determine discrimination, or rather, the state's broader tax regime.

Equal Employment Opportunity Comm'n v. Abercrombie & Fitch Stores (No. 14-86) involves interpretation of Title VII of the Civil Rights Act of 1964 and its mandate of religious accommodation. Below, the Tenth Circuit ruled that Abercrombie & Fitch was entitled to summary judgment on a Title VII claim brought against it by a prospective employee, because the job applicant "never informed Abercrombie prior . . . that she wore her headscarf or 'hijab' for religious reasons and that she needed an accommodation for that practice."

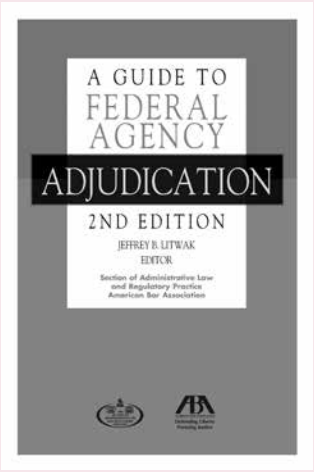
In *United States v. June* (No. 13-1075, argued Dec. 10, 2014), the question is whether the Federal Tort Claims Act can be equitably tolled. Specifically, the Ninth Circuit held that the Act's two-year time limit for filing administrative claims, *see* 28 U.S.C. § 2401(b), is not jurisdictional, and thus, can be equitably tolled.

Finally, the question in *M&G Polymers USA, LLC v. Tackett* (No. 13-1010, argued Nov. 10, 2014) is whether, under the Labor Management Relations Act, a collective bargaining agreement must contain particular language to vest health care benefits, or whether silence in the agreement suffices for the benefits to vest.

A Guide to Federal Agency Adjudication, 2nd Edition

Edited by Jeffrey B. Litwak

A Guide to Federal Agency Adjudication, now in its second edition, retains the structure and much of the text of the original edition but also includes updates on important changes and developments in the law. In addition to updates, the 2nd edition includes expanded footnotes that give more depth and understanding to issues requiring more than a single sentence explanation. Also, the authors and editor highlight circuit splits and subjects that courts have not yet conclusively addressed. Newly added is a chapter on Adjudication in the 2010 Model State Administrative Procedure Act (MSAPA). Whether a private or government lawyer who engages in adjudication before federal agencies, or an administrative law judge deciding federal adjudication cases, you will not want to be without this invaluable handbook.



2012 320 pages 6X9
PC: 5010072

$75.95—general public
$59.95—Ad Law Section member price

To order or for more information, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.

For more information, or to order,
visit our website **www.ababooks.org** or call (800) 285-2221.

News from the Circuits

By Bill Jordan[*]

9th Circuit—Company may not bring declaratory judgment action against environmentalists expected to challenge agency approval of company plans

As a condition of pursuing exploratory drilling in the Arctic Ocean, Shell obtained approval of two oil spill response plans from the Bureau of Safety and Environmental Enforcement. Shortly thereafter, the company brought suit against several environmental organizations, seeking a declaration that the Bureau's approval of its plans did not violate the Administrative Procedure Act. Although Shell sought to relieve itself "from the Damoclean threat of impending litigation which a harassing adversary might brandish"—precisely the purpose of the Declaratory Judgment Act—the Ninth Circuit rejected this effort in *Shell Gulf of Mexico Inc. v. Center for Biological Diversity, Inc.*, 2014 WL 5839951 (9th Cir. 2014).

As is so often the case in the administrative arena, the true adversaries in the circumstance were private parties, Shell and the environmentalists. In light of the environmentalists' history of opposition and litigation with respect to drilling in the Arctic, "Shell asserted that it needed to accelerate resolution of the allegedly inevitable challenge to the Bureau's action in order to protect its investments and conduct exploratory drilling without the threat of judicial intervention." The problem was that, although Shell's practical and substantive interests were directly opposed to those of the environmentalists, those opponents did not have the "adverse legal interests" necessary to support an action under the Declaratory Judgment Act.

The Declaratory Judgment Act provides that the federal courts "may declare the rights and other legal relations of any interested party seeking such declaration." The statute does not create new substantive rights for potential litigants, but provides an alternative mechanism for seeking to "determine whether they have any legal obligations to their potential adversaries." This makes sense in the context of purely private disputes, but it does not fit the administrative dispute context.

The problem for Shell was that the legal adversaries in a dispute over whether an agency approval violates the APA are the agency and a party that opposes the approval. An opposing party is "aggrieved" under §702 of the APA. Since Shell supports the approval, its legal interests are not adverse to those of the agency and it is not "aggrieved." The environmentalists could challenge the agency approval, but the only way Shell could become involved in the dispute would be by intervening in the action brought by the environmentalists. The only way that Shell and the environmentalists can contend with each other is through their support for or challenge to the agency's action. They cannot do so directly.

Moreover, if a court were to issue a declaratory judgment in a case of this sort, it would create the untenable situation of the agency's approval having been declared valid or invalid without the agency having been a party to the litigation. And the matter could have been adjudicated (assuming no intervention by the agency) without the court ever having heard from the agency about the validity of its approval.

D.C. Circuit splits on FDA claim of "inherent authority" to reconsider a decision

Despite the well-recognized principle that, "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion," the panel majority in *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81 (D.C. 2014), invalidated an FDA reconsideration on the equally well-recognized principle "that an agency may not rely on inherent reconsideration authority 'when Congress has provided a mechanism capable of rectifying mistaken actions.'" The governing principle was that "Congress intends to displace an administrative agency's inherent reconsideration authority when it provides statutory authority to rectify the agency's mistakes." The significance of the decision lies in the difference between the majority and the dissent on the question of whether a particular statutory provision should be held to preclude FDA reconsideration without further process.

The predecessor to Ivy Sports Medicine submitted a "premarket notification" of a certain surgical device to the FDA, seeking to have the device recognized as either Class I or Class II on the ground that the device was "substantially equivalent" to a device was already on the market. This type of approval would have allowed the company to get its device on the market as quickly as possible. The alternative was to seek recognition under Class III, which would have required an extensive pre-market approval process. After the company submitted its first "premarket notification" in 2005, the FDA initially responded with a letter stating that the device was not a substantial equivalent, but the FDA agreed to convert that finding into a request for more information. Upon receiving the additional information, the FDA again concluded that the device was not a substantial equivalent. In 2006, the company submitted a second pre-market notice, and the

[*]Associate Dean of Academic Affairs, University of Akron Law School.

FDA again concluded that the device was not a substantial equivalent. At that point, the company and various politicians sought meetings with FDA officials concerning the approval process. The FDA refused to change its position, but it indicated that the company could submit yet another premarket notification. FDA staff members again recommended that the device be found not to be substantially equivalent to prior approved devices, but the FDA official in charge then convened an expert advisory panel, which concluded that the device was as safe and effective as those already on the market. On that basis, the FDA found that the device was a substantial equivalent under Class II.

This decision triggered adverse press coverage and political pressure from opposing interests, which claimed improprieties in the FDA decision-making process. The newly-appointed Acting FDA Commissioner then ordered an investigation of the approval process. The resulting negative report triggered the appointment of a new FDA team and a second expert panel to review the matter, which ultimately resulted in an FDA conclusion that the device was not a substantial equivalent and would have to go through Class III review before going on the market. This caused the predecessor company to go bankrupt.

That company then challenged the FDA's ultimate decision on the ground that the agency did not have the inherent authority to change its decision because the statute specifically provided for a particular mechanism (including a process of notice and comment) to reclassify devices. The majority agreed because the statute provided that, "Based on new information respecting a device, the Secretary may, upon his own initiative or upon petition of an interested person, by regulation (A) change such device's classification." Thus, "because FDA concededly could have used Section 360c(e) to reclassify [device] into Class III, it could not rely on a claimed inherent reconsideration authority to short-circuit that statutory process and revoke its prior substantial equivalence determination to achieve that same result."

The dissent disagreed on several grounds, the first of which was a relatively straightforward matter of applying the statutory provision relied upon by majority. That provision provided for a change of classification based "on new information." Since this was not a matter of new information, but reconsideration by new decision-makers, that provision did not even apply. The majority had sidestepped this issue by noting that the FDA had acknowledged that it could have used the statutory reclassification procedure to reclassify the device, but the majority did not identify any new information that could actually have triggered application of the statutory provision.

The dissent then argued based upon related statutory provisions that the reclassification provision at issue was intended for a so-called "down classification" from Class III (where safety and effectiveness are both directly at issue and more procedures are required) to Class I or II (where the issue is substantial equivalency). The dissent also questioned whether the FDA had been correct in acknowledging that it could have used the statutory reclassification provision since there was no new information and the provision was not intended for the situation.

The basic principles governing the availability of inherent authority to change an agency decision are not in dispute, and the details of this statutory regime are of little interest beyond its boundaries. The interesting question here is why the judges made those choices and the implications of their decisions.

Both decisions seem within the range of reason, although the majority does not adequately address the apparent lack of any new information to trigger use of the statutory reclassification. The majority position, taken by two Republican appointees, restrains agencies' ability to correct themselves without burdensome and time-consuming procedures. It may cause agencies to be unduly cautious in expressing any positions as final. In circumstances of this sort, for example, an agency would have the incentive to state its position in tentative terms so it could gauge political and other public reaction before clearly stating a final conclusion. If politicians were to thunder, the press to rage, and staff members to complain, as happened here, the agency would then be able to call upon additional experts to continue its as-yet unfinished decision-making process. This might avoid this sort of dispute and even improve decisions, but in the aggregate it would be likely to cause significant delay and impose unnecessary costs.

By contrast, the dissenting position, taken by one Democratic appointee, leaves agencies relatively free to change decisions by characterizing them as corrections. This could open the door to inappropriate political or internal manipulation, as the company no doubt believed occurred in this case. The details of particular statutory regimes would probably control much of this potential for abuse, but it is still a possibility.

One good example of agency success on arbitrary and capricious review, and another that may signal more stringent "substantial evidence" review

Sometimes a court's language describing the matter at issue strongly suggests the likely outcome, and sometimes language hidden deep within an opinion may indicate

that change is coming. The first was true of *American Whitewater v. Tidwell*, 2014 WL 5653174 (4th Cir. 2014), in which the Fourth Circuit said, "The crux of American Whitewater's claim is that the Forest Service struck the wrong balance." When the question is whether an agency's decision is arbitrary and capricious, the characterization of the issue is whether the agency achieved the right balance signals very rough waters ahead for the challenger.

American Whitewater, representing the interests of kayakers, whitewater rafters, and other river enthusiasts, challenged a Forest Service decision to restrict "floating" on the Headwaters of the Chattooga River from May through November, while prohibiting it the rest of the year (it had previously been prohibited altogether in the Headwaters area). An environmental group and riparian property owners attacked the decision from the other side, arguing that the agency should not allow floating at all in light of the interests protected by the Wild and Scenic Rivers Act.

Addressing the arbitrary and capricious challenge, the court first discussed the standard of review, noting particularly that "so long as the agency 'provide[s] an explanation of its decision that includes a rational connection between the facts found and the choice made,' its decision should be sustained," and that "review is particularly deferential when, as is the case here, "resolution of th[e] dispute involves primarily issues of fact" that implicate 'substantial agency expertise,' . . . and the agency is tasked with balancing often-competing interests." The court then reviewed the agency's decision, which allowed floating "when water conditions are best, and also easiest to predict, so that users can plan ahead to take advantage of the best opportunities for Headwaters floating," while requiring a "floater-free environment when conditions are best for fishing and hiking." The court also noted the agency's record-based conclusion that the restrictions were appropriate to avoid conflicts between anglers and floaters. This is a particularly good example of a court perceiving a clearly explained and well supported basis for an agency's decision. This case, with three contending private interests is also a good example of a court leaving the balancing of interests to the agency.

The court rejected American Whitewater's interesting argument that since floating had previously been prohibited in the Headwaters area, "the Forest Service was required to authorize floating during the study period before it could accurately assess the likelihood of conflicts on the Headwaters." American Whitewater essentially argued for a controlled experiment. Although the court characterized this position as counterintuitive, it had a certain logic since the previous prohibition of floating meant there was no history of floater-angler conflict in the Headwaters. But the record adequately revealed such conflicts in other areas, and the court refused to "second guess an agency's reasonable choice of methodology." Ultimately, the problem was that American Whitewater "disagrees with the Forest Service's factual conclusions and the balance it chose to strike. But the APA does not give [the court] license to second-guess an agency's well-reasoned decision simply because a party disagrees with the outcome."

A second decision, *National Oilseed Processors Ass'n v. Occupational Safety & Health Administration*, 2014 WL 5393871 (D.C. Cir. 2014), is noteworthy not for its particulars, but because of the language the court used in describing "substantial evidence" review of a rule. Here, the Occupational Safety and Health Act required standard notice-and-comment rulemaking to adopt the safety standard at issue, but provided that the agency's decision "shall be conclusive if supported by substantial evidence in the record considered as a whole." Usually, agency rules are reviewed under the arbitrary and capricious standard of review, not the substantial evidence standard.

The question is whether, and if so how, substantial evidence review differs from arbitrary and capricious review. Justice (then Judge) Scalia once wrote that as applied to factual decisions, the two tests "are one and the same," and that the distinction between the two is "largely semantic." *Association of Data Processing Service Organizations, Inc. v. Board of Governors*, 745 F.2d 677, 683 (D.C. Cir., 1984). Nonetheless, the D.C. Circuit in *National Oilseed Processors*, wrote that the "substantial evidence standard demands more stringent review of OSHA rules than would the APA's arbitrary and capricious standard." The rest of the opinion suggests that this was a particularly weak challenge, so this articulation of a more demanding standard of review would have made no difference to the outcome of this case. It could be an invitation to mischief, prompting courts somehow to give greater scrutiny under the substantial evidence test even in the absence of any accepted articulation of just how that scrutiny could actually be any greater than arbitrary and capricious review. This panel noted, however, that "this court has cautioned, in view of an 'emerging consensus' of the Courts of Appeals, that the difference between the two standards should not be "exaggerate[d]."'

D.C. Circuit—Statute of limitations on review of rule runs from date of court-ordered reinstatement after repeal, not from date of original adoption

Electoral politics are not mentioned in *Alaska v. U.S. Dept. of Agriculture*, 2014 WL 5786484 (2014), but they are the source of this dispute over application of the statute of limitations on review of rules. Under 28 U.S.C. §2401(a), " every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." The application of this statute of limitations is simple enough when a rule is initially adopted, but what if the same rule is adopted, repealed, and reinstated by court order?

On January 5, 2001, President Clinton's Secretary of Agriculture Dan Glicksman signed the Roadless Rule, which appeared in the Federal Register on January 12, 2001. After Present George W. Bush was inaugurated on January 20, 2001, his administration repealed the rule in 2005. A year later, a federal magistrate judge appointed by President Clinton ordered reinstatement of the rule in *California ex rel. Lockyer v. U.S. Department of Agriculture,* 459 F.Supp.2d 874, 916 (N.D.Cal.2006). As a result, the rule was again in effect, with no change to either its requirements or the support or rationale for its adoption. This is distinct from a reinstatement after remand, in which there has typically been some change of the rule, and there has always been some addition to the record or new articulation of the rationale.

In 2011, the State of Alaska challenged the Roadless Rule. Asserting that the state's cause of action against this rule had initially accrued in 2001, the Force Service argued that Alaska was out of time. The D.C. Circuit disagreed on the straightforward ground that "a new right of action necessarily accrued upon the rule's reinstatement in 2006." This was a new rule identical to the old rule, not a revival or extension of the old rule. The court analogized the situation to its own "reopener" doctrine, under which "when the agency . . . by some new promulgation creates the opportunity for renewed comment and objection," the period for judicial review begins anew. The two are quite different, however, because a new promulgation with additional comment creates a new record. On these facts, the more compelling point would be that the 2005 repeal of the rule effectively prevented judicial review of the substance by someone opposed to the rule. At that point, there was no cause of action. Only upon reinstatement would there have been a cause of action, and the most straightforward reading of the statute of limitations provision was to apply its terms to the rule as of the date of reinstatement.

6th Circuit applies Chevron deference to a Medicare manual

In *Atrium Medical Center v. U.S. Dept. of Health and Human Services*, 766 F.3d 560 (2014), the Sixth Circuit relied at length upon the guidance of *Barnhart v. Walton* to determine that *Chevron* deference rulemaking applies to a Medicare manual that had not been adopted through the notice-in-comment process. One member of the panel declined to join this discussion on the ground that the distinction between *Chevron* and *Skidmore* deference made no difference to the outcome.

To review, in 1984 the Supreme Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), held that where the implementation of a statutory provision has been delegated to an agency, the courts must accept the agency's interpretation of an ambiguous statutory provision if that interpretation is reasonable. In 2001, the Court held in *U.S. v. Mead Corp.*, 533 U.S. 218 (2001), that *Chevron* deference was available only where Congress had delegated to the agency the authority to make rules with the force of law and the agency had issued its interpretation in the exercise of that authority. Where an agency's interpretation did not meet that test, it qualified only for "power to persuade" deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead* left open the possibility that an informally adopted agency statement could nonetheless qualify for *Chevron* deference where there existed "some other indication of a comparable congressional intent" that the courts should refer to such a statement. In *Barnhart v. Walton*, 535 U.S. 212 (2002), the Court wrote that factors such as "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time" could justify an inference that Congress would have intended *Chevron*-style deference.

Atrium Medical Center relied upon *Barnhart v. Walton to hold that* a Medicare Provider Reimbursement Manual that had not been issued through the notice-and-comment rulemaking process nonetheless qualified for *Chevron* deference. The court first emphasized that the statute had delegated "substantial authority to the Secretary to determine the composition of the wage index" at issue. The legislative history confirmed that "Congress had intended to grant the Secretary exceptionally broad discretion" on this question, and the statute had not mandated "any specific distinction" between the two closely related statutory terms at issue. "Emphasizing that it must not "avoid unreliable shortcuts—such as whether a regulation has the word 'manual' in its title—and instead evaluate each

portion of the PRM on its own terms and circumstances," the court considered several distinct factors in reaching its conclusion. First, it noted that the rulemaking proceeding announcing the wage index specifically incorporated the relevant sections of this Manual and sought comment on those provisions, although the actual text of the Manual is not published in the Federal Register and is not part of a substantive rule. These facts would arguably qualify the Manual for *Chevron* deference under the second prong of the *Mead* test, but the court nonetheless proceeded with the *Barnhart* analysis.

The court held that the interpretive issue "whether to treat short-term disability payments made from general funds via payroll as wages or wage-related costs—is manifestly interstitial," as it involved "the functional distinction between 'wage' and 'wage-related' costs, terms that the Medicare Act does not define." The issue directly involved the agency's "expertise in maintaining the wage index and classifying costs in a manner that comports with the realities of the business of providing healthcare," and it did not affect a large number of hospitals. Finally, the court emphasized the strength and breath of the congressional delegation and noted the complexity of the statutory scheme.

Regulatory Capture and the California Public Utilities Commission

By Michael Asimow[*]

The California Public Utilities Commission (CPUC) is a powerful body that regulates California's gas, water, electricity, and transportation sectors. The CPUC has become engulfed in a scandal that severely undermines its legitimacy. These events were touched off by a tragic gas pipeline explosion in San Bruno (near the San Francisco airport) in 2010. The blast leveled a neighborhood and killed eight people. The pipeline was owned by Pacific Gas & Electric (PG&E), and the disaster revealed critical pipeline safety issues and lax CPUC regulation. Criminal, civil, and regulatory issues arising out of the explosion remain pending with potentially enormous exposure for PG&E. PG&E became the utility that the media loves to hate, and California newspapers have run countless stories denouncing PG&E.

Since the blast, a torrent of emails between PG&E executives and CPUC agency heads and staff members has been released (with even more to come). These emails indicate that the relationship between PG&E and the CPUC had become far too cozy. CPUC chair, Michael Peevey, who recently retired after completing his second term, failed to maintain the requisite distance between the CPUC and PG&E.

One set of emails violated the CPUC's ex parte rules; in a pending rate case, agency heads obliged when PG&E indicated that it didn't approve of the ALJ assigned to the case. Another email found Peevey promising a favorable outcome for PG&E in a pending rate case if it contributed to a party celebrating the 100th anniversary of the PUC and to the campaign opposing a ballot initiative that Peevey wanted to defeat. Another email between PG&E officials claimed that Michael Florio (a CPUC agency head) promised PG&E an alternative decision if it didn't like the first one. (Florio has vigorously denied he made any such promise.) In another email, Peevey described the San Bruno city leaders as "emotional" and "nuts." PG&E has fired the officials responsible for these indiscreet contacts and emails, and has strengthened ethics training for its personnel, but the damage was done.

Administrative law scholars have long been concerned that regulated industries can capture the agency that is supposed to regulate them. This appears to have been the case with PG&E and the CPUC. This unfortunate mess is a sobering reminder to all utility commissions that they must remain at arm's length from the utilities they regulate.

[*]Visiting professor of law at Stanford Law School, professor of law emeritus at UCLA Law School.

Upcoming Section Events

Spring Conference & Council Meeting

Friday, May 1, CLE Programs & Section Dinner

Saturday, May 2, Council Meeting

Walt Disney World Swan Resort, Orlando, Florida

11th Annual Administrative Law & Regulatory Practice Institute

Thursday, April 23, 2015, Full day
Institute CLE Program

Friday, April 24, 2015, Half Day
Rulemaking 101 and Judicial Review

Walter E. Washington Convention Center, Washington, DC

ABA Annual Meeting Council & Membership Meeting

Saturday, August 1, 2015 from 8 am–4 pm

Chicago, Illinois

10th Annual Homeland Security Law Institute

Thursday, August 27–Friday, August 28, 2015

Hyatt Regency Washington on Capitol Hill, Washington, DC

Administrative Law Conference

Thursday, October 29–Friday, October 30, 2015

Walter E. Washington Convention Center, Washington, DC

News from ACUS

By Connie Vogelmann and Amber Williams†*

At the end of the Administrative Conference of the United States' 50th Anniversary year, the agency is hard at work and continues to advance its mission of improving the administrative process. Projects are at all stages of development and implementation, and range from examining petitions for rulemaking to mapping "formal" and "informal" adjudication within the federal government. Some Conference projects, like Retrospective Review of Agency Rules and Agency Adverse Publicity, make use of the agency's singular history and institutional knowledge to build upon or expand past research projects. Other projects, such as the Best Practices for Using Video Teleconferencing for Hearings, seek to situate administrative practice in our modern—and rapidly changing—world.

December 2014 Plenary

The Administrative Conference's 61st Plenary Session took place on December 4th and 5th, and the full Assembly adopted three recommendations.

First, the Conference adopted the Committee on Regulation's Recommendation on Retrospective Review of Agency Rules. The Recommendation encourages agencies to develop robust retrospective review practices to foster stronger post hoc examination of agency rules. Also, the Conference plans to hold a workshop in early 2015 to discuss agency innovations in connection with retrospective review, including use of economic tools to ensure rigorous benefit-cost analysis of regulations. Dr. Joseph Aldy, researcher for this project, and Reeve Bull, staff counsel for the committee, are organizing the workshop, which may result in a follow-up project on retrospective review.

Second, the Conference adopted the Committee on Rulemaking's Recommendation on Petitions for Rulemaking, which seeks to balance the public's right to petition with agencies' need to retain decisional autonomy. Professors Richard Revesz and Jason Schwartz serve as research consultants, and Emily Bremer as staff counsel. This Recommendation builds on two previous recommendations (*Recommendation 86-6, Petitions for Rulemaking* and *Recommendation 95-3, Review of Existing Agency Regulations*), the first of which was adopted almost 30 years ago. At the same time, the Recommendation also considers modern tools, seeking to help agencies use electronic resources to increase transparency and efficiency.

Third, the Conference adopted the Committee on Adjudication's Recommendation on Best Practices for Using Video Teleconferencing for Hearings. Professors Fredric Lederer, Martin Gruen, and Christine Williams serve as research consultants, Amber Williams as staff counsel. This Recommendation aims to develop best practices for the use of video teleconferencing in adjudicative hearings, and addresses issues including hearing equipment and conditions, training, financial considerations, procedural practices, fairness, and satisfaction. The Recommendation also provides for the development of a video hearings handbook by the Conference's Office of the Chairman.

Current Projects

The Administrative Conference also has several ongoing projects.

First, the research phase of the Federal Administrative Adjudication project is nearing completion. Professor Michael Asimow serves as research consultant, Amber Williams as project coordinator. This project seeks to map the contours of the federal administrative adjudicatory process, including both "formal" adjudication conducted under the Administrative Procedure Act and "informal" adjudication outside the bounds of the Act. Currently, there is no single up-to-date resource that paints a comprehensive picture of agency adjudications across the federal government; this study aims to fill that gap. Through this project, the Conference aims to explore the wide variety of agency adjudicatory schemes across the federal government; catalog and compare types of matters handled by formal and informal adjudication; describe the federal administrative judiciary; and collect and analyze agency caseload statistics and other empirical data. All of the information will be uploaded into a publically available database co-sponsored by Stanford Law School and the Administrative Conference. Further, the project will yield a published report that will serve as a unique resource for members of Congress and their staffs, federal agency and judicial officials, Conference members, and the general public. The report will also likely be taken up by the Committee on Adjudication and is expected to yield recommendations and future projects.

Second is the Committee on Regulation's project on the Unified Agenda. This project will study the Unified Agenda of Regulatory and Deregulatory Actions to determine the extent to which it provides the public with useful information about forthcoming "significant" regulatory actions. Curtis Copeland is research consultant; Reeve Bull is staff counsel.

* Attorney Advisor, Administrative Conference of the United States.
† Attorney Advisor, Administrative Conference of the United States.

Third, the Committee on Adjudication is working on a Declaratory Orders project. The project will examine procedures and best practices for issuing declaratory orders in administrative adjudications. Among other issues, the project will evaluate the legal parameters of agency issuance of declaratory orders; examine the challenges to issuance of declaratory orders (and investigate why agencies have not made greater use of them); evaluate agency policies to ensure declaratory orders are used lawfully, fairly, and effectively; and evaluate whether there are lessons for administrative agencies from the judicial experience. Emily Bremer is in-house researcher for this project; Amber Williams is staff counsel.

Fourth, the Committee on Judicial Review is working on a project on agency adverse publicity. The project will examine changes in agency adverse publicity practices that have occurred over the past 50 years, since Ernest Gellhorn's 1973 study on the same subject (the study culminated in *Recommendation 73-1, Adverse Agency Publicity*). This project will focus particular attention on changes brought about by the Internet age, including new tools of information dissemination and the rapid disclosure of information that these tools allow. Professor Nathan Cortez is research consultant for this project; Stephanie Tatham is staff counsel.

Fifth, the Conference is working on a Federal Courts Analysis for the Social Security Administration. This project will consist of an independent study of federal court review in Social Security Disability Insurance and Supplemental Security Income cases. Ms. Tatham serves as staff counsel for this project.

Sixth, the Committee on Regulation will be undertaking a project on Federal Licensing and Permitting. Reeve Bull has scheduled a workshop for in February 2015, that will examine the use of general permitting and will explore possible reforms designed to streamline the federal permitting and licensing system. The workshop will feature the work of Professors J.B. Ruhl and Eric Biber and will include agency officials involved in the permitting and licensing process.

Finally, the Committee on Judicial Review will study judicial issue exhaustion doctrine and evaluate whether it should be employed in administrative rulemaking. Professor Jeff Lubbers is research consultant; Stephanie Tatham is staff counsel.

Implementation of Recommendations

Several of the Administrative Conference's recent projects have received notable attention and support over the past several months:

In November 2014, the Office of the Federal Register ("OFR") published its final rule on incorporation by reference, which is consistent with *Recommendation 2011-5 Incorporation by Reference* and encourages its implementation. OFR also made some changes to its final rule in response to the Office of the Chairman's comments on the proposed rule.

In October 2014, OFR issued a Notice of Proposed Rulemaking updating its 1972 regulations governing the Federal Register system. OFR proposes to add a provision requiring agencies to remove judicially vacated rules. These proposed revisions would implement *Recommendation 2013-6, Remand Without Vacatur*, which promotes removal of vacated regulations from the Code of Federal Regulations.

In August 2014, a bipartisan bill that would implement *Recommendation 2012-6, Reform of 28 U.S.C. § 1500* and American Bar Association ("ABA") Resolution 300 was introduced in the Senate. In November, companion legislation was favorably reported by the House Judiciary Committee.

Finally, Reeve Bull has been involved in several activities promoting the implementation of *Recommendation 2011-6, International Regulatory Cooperation*, with which ABA Resolution 109B and Executive Order 13,563 closely tracked, including last fall organizing a panel related to recent developments in the Transatlantic Trade and Investment Partnership (TTIP) for the annual ABA Administrative Law Section Conference and participating in a TTIP workshop organized by George Washington University's Regulatory Studies Center.

If you have any questions about the Conference's activities, or wish to submit a project idea, please contact Senior Attorney and Research Coordinator Emily Bremer at ebremer@acus.gov.

If you wish to inquire about any specifically referenced resource, please contact either Amber Williams at awilliams@acus.gov or Connie Vogelmann at cvogelmann@acus.gov.asdfsdf.

Recent Articles of Interest

By William Funk[*]

Forty-Fourth Annual Administrative-Law Symposium: Taking Administrative Law to Tax. 63 Duke L.J. 1625 (2014). Amandeep S. Grewal, *Taking Administrative Law to Tax*; Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention under Federal Tax Law*; Bryan T. Camp, *A History of Tax Regulation Prior to the Administrative Procedure Act*; Kristin E. Hickman, *Administering the Tax System We Have*; Steve R. Johnson, *Reasoned Explanation and IRS Adjudication*; Leandra Lederman, *(Un)appealing Deference to the Tax Court*; Lawrence Zelenak, *Maybe Just a Little Bit Special, after All?*

Symposium, The Promise and Limits of Presidential Power in Pursuing Climate Change Action, 32 Va. Envtl. L.J. 97 (2014). Robert M. Sussman, *Power Plant Regulation under the Clean Air Act: a Breakthrough Moment for U.S. Climate Policy*; Robert V. Percival, *Presidential Power to Address Climate Change in an Era of Legislative Gridlock*; Victor B. Flatt, *Focus and Fund: Executing Our Way to a Federal Climate Change Adaptation Plan*; Alice Kaswan, *Controlling Power Plants: the Co-Pollutant Implications of EPA's Clean Air Act Section 111(d) Options for Greenhouse Gases*.

Liza Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 Pace Envtl. L. Rev. 325 (2014). The article discusses the relationship between the Environmental Protection Agency ("EPA") and the White House. It focuses specifically on the role that the Office of Information and Regulatory Affairs ("OIRA"), within the Office of Management and Budget ("OMB"), plays in reviewing the EPA's regulatory output. OIRA's actual practice in reviewing agency rules departs considerably from the structure created by the executive order governing OIRA's process of regulatory review. The distribution of decision-making authority is ad hoc and chaotic rather than predictable and ordered; the rules reviewed are mostly not economically significant but rather, in many cases, are merely of special interest to OIRA staffers; rules fail OIRA review for a variety of reasons, some extra-legal and some simply mysterious; there are no longer any meaningful deadlines for OIRA review; and OIRA does not follow—or allow agencies to follow—most of the transparency requirements of the relevant executive order. Describing the OIRA process as it actually operates today goes a long way toward previewing the substantive problems with it. The process is utterly opaque. It rests on assertions of decision-making authority that are inconsistent with the statutes the agencies administer. The process diffuses power to such an extent that at the end of the day no one is accountable for the results it demands (or blocks, in the case of the many rules stalled during the OIRA process). And, through it all, environmental rules take a particular beating, from the number of such rules reviewed to the scrutiny they receive to the changes they suffer in the course of the process.

Jeffrey A. Love and Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 Mich. L. Rev. 1195 (2014). Imagine two presidents. The first campaigned on an issue that requires him to expand the role of the federal government—maybe it was civil rights legislation or stricter sentencing for federal criminals. In contrast, the second president pushes policies—financial deregulation, perhaps, or drug decriminalization—that mean less government involvement. Each is elected in a decisive fashion, and each claims a mandate to advance his agenda. The remaining question is what steps each must take to achieve his goals. The answer is clear, and it is surprising. To implement his preferred policies, the first president faces the full gauntlet of checks and balances—from the formal requirements of bicameralism and presentment to the modern congressional vetogates. And yet the president aiming to govern by inaction faces virtually none. Instead, to get the federal government out of a particular issue, the second president needs only to ensure that existing laws are not implemented. Critically, he can achieve this goal without the help of Congress or the courts; he can simply direct his executive agencies accordingly. In the modern administrative state, the president's refusal to enforce duly enacted statutes—what we call "presidential inaction"—will often dictate national policy but will receive virtually none of the checks and balances the Founders envisioned. This asymmetry between action and inaction cannot be justified if we are to remain faithful to the notion that interbranch competition is the core virtue of our constitutional regime. Yet the stakes are even greater than a need to update our theory of the separation of powers. Unchecked inaction fuels an imbalanced political structure that endows the modern executive with more power to change the scope of government than the Framers—or even the architects of the New Deal—ever imagined. This imbalance amounts to a thumb on the scale, allowing presidents to abandon unilaterally the governmental functions to which they are opposed. In other words, it creates a structural bias against government intervention. The separation of powers is, of

[*]Lewis & Clark Distinguished Professor of Law, Lewis & Clark Law School.

course, intended to create friction, to make it difficult to pass legislation. We consider this a feature of our system, not a bug. But once legislation is enacted, the president is obligated to enforce it. Put simply, if the president does not want to enforce a law, he must advocate for its repeal. He may not simply ignore it.

Adrian Vermeule, "No" Review of Philip Hamburger, "Is Administrative Law Unlawful?" forthcoming in Texas Law Review, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2488724. Philip Hamburger has had a vision, a dark vision of lawless and unchecked power. He wants us to see that American administrative law is "unlawful" root-and-branch, indeed that it is tyrannous—that we have recreated, in another guise, the world of executive "prerogative" that would have obtained if James II had prevailed, and the Glorious Revolution never occurred. The administrative state stands outside, and above, the law. But before criticism, there must first come understanding. There is too much in this book about Charles I and Chief Justice Coke, about the High Commission and the dispensing power. There is not enough about the Administrative Procedure Act, about administrative law judges, about the statutes, cases and arguments that rank beginners in the subject are expected to learn and know. The book makes crippling mistakes about the administrative law of the United States; it misunderstands what that body of law actually holds and how it actually works. As a result the legal critique, launched by five-hundred-odd pages of text, falls well wide of the target.

James Dawson, *Retroactivity analysis after Brand X. (National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967, 2005.)*, 31 Yale J. on Reg. 219 (2014). Under *Brand X*, federal courts must reverse their own prior precedent in deference to an intervening agency decision if that agency decision is based on a reasonable interpretation of the statute. Thus, if the first-in-time court sets the law at A, and if a second-in-time agency later finds that B is a superior interpretation of the statute, then the third-in-time court must defer to the agency and move the law from A to B. But can law B be retroactively applied to a litigant who reasonably relied on the first-in-time court's opinion that the law was A? The answer to that question depends on which retroactivity standard applies to the *Brand X* problem, which in turn depends on the answers to two threshold legal questions. First, does the decision to move the law from A to B "change" the law, or does it merely "clarify" what the law has always been? Second, if the law has been changed, should that change be attributed to the second-in-time agency, which offered the "authoritative" interpretation of the statute, or to the third-in-time court, which decided whether to ratify that interpretation? Recent decisions have created circuit splits on both questions, and the Supreme Court has offered little guidance. This Note argues that a move from A to B does "change" the law, and that the third-in-time court, rather than the agency, is legally responsible for the change. In hopes of protecting reasonable litigants from the specter of retroactivity, this Note then proposes and defends a default rule for federal courts faced with the *Brand X* problem. In effect, this proposal would establish a rebuttable presumption that a small subset of administrative rules—all those which overrule first-in-time court precedents—should not become operational unless and until they are ratified by third-in-time federal courts.

Margaret B. Kwoka, *Deference, Chenery, and FOIA*, 73 Md. L. Rev. 1060 (2014). Litigation fails to check adequately agency secrecy decisions under the Freedom of Information Act ("FOIA"). To vindicate the public's right to know what its government is up to, the dynamic of FOIA litigation needs fundamental change. This article builds on previous work documenting that courts routinely defer to agency decisions to withhold records from the public, despite Congress's clear mandate for de novo judicial review. In this article, a paradox is revealed: while courts do not effectuate true de novo review, they rely on that statutory standard to allow agencies to raise claims of exemption in litigation not relied on in the agency's response to a request for information. As a result, requesters end up in a worse position under de novo review than they would have been if Congress had chosen deferential review in FOIA cases. Given existing practice, FOIA's goal of transparency would be best served by relocating FOIA within a more typical administrative law paradigm. Chiefly, it contends that the observed deference justifies applying the *Chenery* principle to FOIA litigation, which would preclude agencies from asserting exemption claims for the first time in litigation. This article demonstrates that not only can the application of *Chenery* be justified doctrinally and theoretically, but also that the benefits of constraining agency litigation positions outweigh potential costs, rendering FOIA litigation a more fundamentally fair process that better advances the goals of FOIA.

Aaron L. Nielson, *in Defense of Formal Rulemaking*, 75 Ohio St. L.J. 237 (2014). Since *Florida East Coast Railway*, few have risen to formal rulemaking's defense. Indeed, no scholar in over thirty years has seriously considered formal rulemaking's virtues. This article fills the void. While formal rulemaking's robust procedural protections admittedly can be a misfit in some contexts,

it may be a mistake to categorically dismiss them in all contexts, especially because formal rulemaking has the potential to facilitate better rules of greater legitimacy. In today's world where a handful of technically complex rules can impose billions of dollars of costs on the nation's economy, the time has come to ask whether formal rulemaking might yet play a limited but crucial role in the future of administrative law.

Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. Rev. 579 (2014). Technocratic judgments can have a cooling function. An insistent focus on the facts, and on the likely consequences of policies, might soften political divisions and produce consensus. Within the federal government, cost-benefit analysis is a prominent example of the cooling function of technocracy. But when undertaken prospectively, such analysis is sometimes speculative and can be error prone. Moreover, circumstances sometimes change, sometimes in unanticipated ways. For this reason, retrospective analysis, designed to identify the actual rather than expected effects, has significant advantages. The "regulatory lookback," first initiated in 2011 and undertaken within and throughout the executive branch, has considerable promise for simplifying the regulatory state, reducing cumulative burdens, and increasing net benefits. It deserves a prominent place in the next generation of regulatory practice. Recent history also suggests that it might well soften political divisions.

David Thaw, *Enlightened Regulatory Capture*, 89 Wash. L. Rev. 329 (2014). Regulatory capture generally evokes negative images of private interests exerting excessive influence on government action to advance their own agendas at the expense of the public interest. There are some cases, however, where this conventional wisdom is exactly backwards. This article explores the first verifiable case, taken from healthcare cybersecurity, where regulatory capture enabled regulators to harness private expertise to advance exclusively public goals. Comparing this example to other attempts at harnessing industry expertise reveals a set of characteristics under which regulatory capture can be used in the public interest: (1) legislatively mandated adoption of recommendations by an advisory committee comprising private interests and "reduced-bias" subject matter experts; (2) relaxed procedural constraints for committee action to prevent internal committee capture; and (3) opportunities for committee participation to be worthwhile for representatives of private parties beyond the mere opportunity to advance their own interests. This Article presents recommendations based on those characteristics as to how and when legislatures may endeavor to replicate this success in other industries to improve both the legitimacy and efficacy of the regulatory process.

Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. Chi. L. Rev. 481 (2014). How should administrative agencies choose among the different policy-making instruments at their disposal? Although the administrative law literature has explored this question with respect to the instruments of adjudication and rule making, it has failed to appreciate two other powerful instruments at agencies' disposal: advance ruling and licensing. Taking these four policy-making instruments into consideration, this article provides a general theory to guide agencies in selecting the most suitable policy-making instrument in different policy environments. To do so, the article utilizes a new game-theoretic framework, focusing on two central dimensions of policy-making instruments in particular: timing and breadth. This framework provides two valuable implications. First, it highlights two key administrative challenges that are underappreciated by the academic literature: the holdup and leniency problems. And second, the framework shows that administrative agencies are underutilizing two powerful policy-making instruments, namely, licensing and advanced rulings. The author argues that these two instruments are valuable across areas of law.

Michael A. Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. Chi. L. Rev. 609 (2014). The presidential mandate that agency rule makings be subjected to cost-benefit analysis and regulatory review is one of the most controversial developments in administrative law over the past several decades. There is a prevailing view that the role of cost-benefit analysis in the executive branch is to help facilitate control of agencies by the Office of Information and Regulatory Affairs (OIRA). This article challenges that view, arguing that cost-benefit analysis in fact helps preserve agency autonomy in the face of oversight. This effect stems from the constraints imposed on reviewers by the regularization of cost-benefit-analysis methodology and the fact that agencies have played a major role in shaping that methodology. The autonomy-preserving effect of cost-benefit analysis has been largely ignored in debates over the institution of regulatory review. Ultimately, cost-benefit analysis has ambiguous effects on agency independence, simultaneously preserving, informing, and constraining agency power.

John T. Plecnik, *Officers under the Appointments Clause*, 11 Pitt. Tax Rev. 201 (2014). Much ink has been spilled, and many keyboards worn, debating the definition of "Officers of the United States" under the Appointments Clause the Constitution. Most recently, this debate has focused on the denizens of the Office of Appeals of the Internal Revenue Service (IRS). In *Tucker I*, the U.S. Tax Court faced the question of whether the settlement officers,

appeals officers, and appeals team managers (collectively, IRS hearing officers) within the Office of Appeals are Officers or mere employees. In *Tucker II*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) faced the same question on appeal. Both courts sided with the IRS in holding that none of the above are Officers. Although it hardly seems controversial to agree with the Tax Court and D.C. Circuit when the U.S. Supreme Court denies certiorari in the case, remarkably, all previous scholarship disputes the outcome of the Tucker decisions. This article will defend that outcome as a proper application of Supreme Court precedent.

Alasdair S. Roberts, Review of "Tocqueville's Nightmare: The Administrative State Emerges in America, 1900-1940," forthcoming in Public Administration Review, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2470612. Modern introductions to administrative law can be dry and technical, because they must account for decades of modern statute and case law. By contrast, Tocqueville's Nightmare illustrates why it all matters. It shows vividly what was perceived to be at stake as the United States entered the age of regulation, and describes the fundamental ways in which law was adjusted to meet the new realities of government.

John C. Coates, IV, *Towards Better Cost-Benefit Analysis: An Essay on Regulatory Management*, forthcoming in Law and Contemporary Problems, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2471682. Cost-benefit analysis of financial regulation (CBA/FR) has become a flashpoint in contemporary legal and political debates, partly due to the Dodd-Frank Act. Yet debates over CBA/FR exhibit terminological confusion, and CBA/FR advocacy has outrun the possible, given data limitations and current research techniques, and has neglected institutional and legal design, relying unreflectively on the dubious idea of judicially enforced quantification in a conventional administrative law framework. The aim of this paper is to take up the institutional design question: how to move towards feasible and net beneficial CBA/FR practices? It argues that just as eliciting shareholder-oriented business decisions in for-profit corporations is a managerial challenge, not susceptible to command and control, so too generating good CBA/FR is a managerial challenge. Courts should have a reduced, not increased, role in reviewing CBA/Fr, and the tools of management—funding, governance, disclosure, regulatory design, and agency culture—are more likely to promote good CBA/FR than simple legal mandates.

Philip Hamburger, *Deference to Administrative Interpretation: The Unasked Questions*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477641. The key questions about judicial deference to administrative interpretation have not yet been asked, let alone answered. Under cases such as *Mead*, *Chevron*, and *Arlington*, judges must "respect" or otherwise "defer" to agency interpretations of ambiguous authorizing statutes. The Supreme Court and myriad scholars justify this deference by asking whether an agency has statutory authorization to interpret. There remain, however, two constitutional questions about the role of the judges. First, under the Constitution, the judges have an office or duty to exercise their own independent judgment about what the law is, and it therefore must be asked how the judges can defer to the interpretation or judgment of executive or other agencies about what the law is. In respecting or otherwise deferring to agency judgments, the judges are abandoning their duty—indeed, their very office—of independent judgment. Second, under the Fifth Amendment, parties have a right to the due process of law, and it therefore must be asked whether judicial deference is really systematic bias for one party and against others. The judges respect or otherwise defer to agencies' interpretations of statutes, and they thereby typically are favoring the interpretation or legal position of one of the parties in their cases. They thus are engaging in systematic bias in favor of the government and against other parties in violation of the due process of law. Even where agencies have authorization to interpret for their purposes, this statutory authority cannot put to rest the constitutional questions about the judges. The statutory authority for agencies cannot excuse the judges from their constitutional duty to exercise their own independent judgment about the law; nor can it brush aside the constitutional right of parties not to be subjected to systematic bias.

J.B. Ruhl and James Salzman, *Exit Strategies for the Administrative State*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482392. Exit is a ubiquitous feature of life, whether breaking up a relationship, dropping a college course, or pulling out of a venture capital investment. In fact, our exit options often determine whether and how we enter in the first place. The same is true for governance. Welfare support ends. Business subsidies expire. While legal scholarship is replete with studies of exit strategies for businesses and investors, the topic of exit has barely been touched in administrative law scholarship. The design "checklist" policy makers and legal academics have devised for new programs leaves exit on the sidelines. This article argues that exit should be a fundamental feature of regulatory design, considered at the

time of program creation. Part I starts from first principles and considers the basic features of exit. It addresses the normative aspect of exit strategies, exploring the different metrics to measure the success of an exit strategy. With these descriptive and normative foundations in place, Part II turns to the design of exit strategies, developing a typology of four different exit strategies for government and regulated/beneficiary parties. It then explores the political economy behind the different strategies. Part III applies the framework to the emerging challenge of fracking as a case study to demonstrate its usefulness in practice. It concludes by describing a new exit strategy model, a hybrid approach of "Lookback Exit."

Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 82 Fordham L. Rev. 703 (2014). For three decades, scholars (as well as courts and litigants) have written thousands of articles (and opinions and briefs) concerning the impact of the *Chevron* deference regime on judicial review of agency statutory interpretation. This should come as no surprise as *Chevron* is the most-cited administrative-law decision of all time. Little attention, however, has been paid to how *Chevron* and its progeny have actually shaped statutory interpretation inside the regulatory state. This Essay presents the findings of the first comprehensive empirical investigation into the effect of *Chevron* and related doctrines on how federal agencies interpret statutes they administer. The Essay draws on a larger, 195-question survey of federal agency rule drafters that covered a variety of topics related to agency statutory interpretation. (The survey is available online at http://ssrn.com/abstract=2481631.) The author administered the survey during a five-month period in 2013 at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (Federal Communications Commission and Federal Reserve). Responses were received from 128 agency officials whose primary duties included statutory interpretation and rulemaking (for a 31% response rate). Based on the findings presented in this Essay, it would not be an understatement to conclude that thirty years of *Chevron* have saturated the federal agency rulemaking process. The rule drafters surveyed overwhelmingly indicated familiarity with and use of *Chevron* and related doctrines in their statutory interpretation efforts. Moreover, two in five rule drafters surveyed agreed or strongly agreed—and another two in five somewhat agreed—that a federal agency is more aggressive in its interpretive efforts if it is confident that *Chevron* deference (as opposed to *Skidmore* deference or de novo review) applies.

Edward Cantu, *The Separation of Powers: The Predictable Fate of Federalism's Structural Cousin*, forthcoming in *Georgetown Journal of Law & Public Policy*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483923. A snapshot of controversies currently surrounding the President highlights a sobering, even if acceptable, reality: we live in an age of extremely amplified president power. From the executive use of military force with little or no congressional approval, to the use of executive orders to effectively make federal policy without congressional involvement, virtually all of these controversies have a common source: the Court's relegation of enforcement of the separation-of-powers to the political process. This article provides an account of this relegation. It argues that all of the Court's separation-of-powers decisions—even those seeming to strictly enforce the boundaries of branch power—make the most collective sense when framed as a narrative of ineffective, and thus merely symbolic judicial stand-taking. Much like "major" federalism decisions, "traditional separation-of-powers decisions" have proven doctrinally inconsequential, but have had the systemic effect of allowing the Court to bow out of the most consequential structural disputes in order to accommodate pragmatic governmental creativity. Thus, the trajectory of federalism jurisprudence over the past century helps inform the inevitable fate of its less developed structural cousin, the separation-of-powers.

Evan Barret Smith, *New Regulations and Pending Cases*, forthcoming in163 U. Penn. L. Rev. Online, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492499. Do new regulations apply to pending cases? The question is simple, but the short answer is a lawyer's favorite: "It depends." It depends on the organic statute, it depends on the regulation, and—unfortunately—it may even depend on which federal Court of Appeals the case happens to be decided by. This article looks at this issue by examining the effect of the Department of Labor's recent amendments to the regulations governing claims under the Black Lung Benefits Act. This article explains why the new regulations are applicable to pending cases, even if the Department of Labor already issued its final decision on a claim and a court is petitioned to review the decision. The analytical route to this result varies by circuit. This article explains why the factor-based retroactivity test of most circuits better addresses fundamental due process concerns and is more administrable than the D.C. Circuit's approach, which turns upon whether a circuit split predates the new regulations. This article both provides a clear answer regarding the application of the 2013 amendments to the black lung

regulations to pending cases and also suggests how courts should handle retroactivity questions for other regulations.

John Graham and James Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, forthcoming in 1 Harv. J. of Law and Pub. Pol., Federalist Ed., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477642. In May 2014, the Harvard Journal of Law & Public Policy published a series of papers as part of a multiauthor collaboration organized by the Mercatus Center at George Mason University. That series of papers, together with a forthcoming article by Hester Peirce, reviews ways in which U.S. federal regulatory agencies engage in regulatory-like actions while avoiding requirements outlined by the Administrative Procedure Act (APA) and regulatory oversight by the Office of Information and Regulatory Affairs (OIRA) of the U.S. Office of Management and Budget (OMB). This article summarizes lessons from the series and offers reform proposals that may improve upon the current situation.

Peter M. Shane and Christopher J. Walker, *Foreword*—Chevron *at 30: Looking Back and Looking Forward*, forthcoming in Fordham L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496532. This Foreword introduces a Fordham Law Review symposium held in March 2014 to mark the thirtieth anniversary of *Chevron U.S.A. v. Natural Resources Defense Council*. The most-cited administrative-law decision of all time, *Chevron* has sparked thirty years of scholarly discussion concerning what *Chevron* deference means, when (or even if) it should apply, and what impact it has had on the administrative state. Part I of the Foreword discusses the symposium contributions that address *Chevron*'s scope and application, especially in light of *City of Arlington v. FCC*. Part II introduces the contributions that explore empirically and theoretically *Chevron*'s impact outside of the judicial-review context—i.e., its effect on legislative- and administrative-drafting theory and practice, its influence within the regulatory state more generally, and its adoption (or lack thereof) in state administrative law. Part III turns to the intersection of *Chevron* and federalism. Part IV concludes by grappling with the contributors' diverse views on whether *Chevron* is indeed a big deal and, if so, whether it is a good or bad deal for the modern administrative state.

Emily S. Bremer, *On the Cost of Private Standards in Public Law*, forthcoming in Kansas L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495082. Federal agencies often give legal effect to privately authored technical standards that the public can access only by paying a fee. It is widely agreed that this practice impedes public participation in the rulemaking process and makes federal regulatory requirements less transparent. Ideally, private standards that are or may be incorporated into federal regulations would be freely available to the public online. But the problem is multidimensional. Tension between the public right to access the law and the private intellectual property rights of standards developers must be resolved within the overarching context of a longstanding and highly valuable public-private partnership in standards. Any approach to expanding the free online availability of private standards must also preserve the ability of federal agencies to fulfill substantive statutory missions to protect public health and safety. This article offers a case study of a recent law that prohibited one federal agency, the Pipeline and Hazardous Materials Safety Administration (PHMSA), from incorporating into regulations or guidance any private standard not freely available to the public online. The confined regulatory context makes possible a much needed analysis of the actual cost of private incorporated standards. The data reveal that standards developers voluntarily provided free online access to a surprisingly large share of PHMSA's standards. The free access mandate produced little marginal improvement over that baseline. Furthermore, it imperiled PHMSA's ability to protect public safety by preventing the continued use of just a few extremely important standards. In the end, Congress was forced to amend the law. PHMSA's experience strongly suggests that simply mandating free online access to private incorporated standards is unworkable. This multidimensional problem requires a more nuanced solution. Collaboration between individual federal agencies and private standards developers holds greater promise for expanding public access without unduly restricting federal agencies' ability to protect public safety by integrating private standards and public law.

Jerry Ellig and Christopher J. Conover, *Presidential Priorities, Congressional Control, and the Quality of Regulatory Analysis: An Application to Health Care and Homeland Security*, forthcoming in Public Choice, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495459. Elected leaders delegate rulemaking to federal agencies, then seek to influence rulemaking via top-down directives and statutory deadlines. This paper documents an unintended consequence of these control strategies: they reduce regulatory agencies' ability and incentive to conduct high-quality economic analysis to inform their decisions. Using scoring data that measure the quality of regulatory impact analysis, the authors find that hastily-adopted "interim final"

regulations reflecting signature policy priorities of the two most recent presidential administrations were accompanied by significantly lower-quality economic analysis. Interim final homeland security regulations adopted during the G.W. Bush administration and interim final regulations implementing the Affordable Care Act in the Obama administration were accompanied by less thorough analysis than other "economically significant" regulations (regulations with benefits, costs, or other economic impacts exceeding $100 million annually). The lower quality analysis apparently stems from the confluence of presidential priorities and very tight statutory deadlines associated with interim final regulations, rather than either factor alone.

Deborah Borie-Holtz and Stuart Shapiro, *Trying to Float in a Sea of Regulation: Perception and Reality About Regulatory Overload*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496436. Most examinations of the effects of regulation examine individual regulations or policy areas. The same is true of most reforms to the regulatory process. This paper raises questions about this focus. The authors survey business-owners in five midwestern states about their attitudes toward regulation. The survey found widespread concern about the volume of requirements for compliance rather than any particular regulations. This finding is robust across numerous different survey questions. The survey also finds however that concern over the volume of regulation varies by political party with Republican business owners much more concerned about regulatory volume than Democratic ones. This could be because Republicans have listened to political rhetoric blaming regulation for economic ills or it could be because business-owners with concerns about regulation flock to the political party that promises to curb government intervention in the economy. Further research is needed on why regulatory volume is a problem and the extent to which the perception it is a problem is politically driven.

Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, forthcoming in Geo. Wash. L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501422. From its birth administrative law has claimed a close connection to governmental practice. Yet as administrative law has grown and matured it has moved further away from how agencies actually function. In particular, as many have noted, administrative law ignores key administrative dimensions, such as planning, assessment, oversight mechanisms and managerial methods, budgeting, personnel practices, reliance on private contractors, and the like. The causes of administrative law's disconnect from public administration are complex and the divide is now longstanding, going back to the birth of each as distinct fields. But it is also a growing source of concern, and internal administration is increasingly becoming the linchpin for ensuring accountable government. Enter the Administrative Conference of the United States (ACUS). ACUS represents one of the rare instances in which administrative law and public administration have been linked and is ideally situated to study administrative law's effects on internal agency operations and assess whether—as well as how—administrative law might be used to improve public administration.

Christopher J. Walker, *Faithful Agency in the Fourth Branch: An Empirical Study on Agency Statutory Interpretation*, forthcoming in 67 Stanford L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501716. The Constitution vests all legislative powers in Congress, yet Congress grants expansive lawmaking authority to federal agencies. Such broad delegation creates a principal-agent problem in the modern administrative state. As positive political theorists have long explored, Congress intends for federal agencies to faithfully exercise their delegated authority, but ensuring fidelity to congressional wishes is difficult due to asymmetries in information, expertise, and preferences that complicate congressional control and oversight. Indeed, this principal-agent problem has a democratic and constitutional dimension, as the legitimacy of administrative governance may well depend on whether the unelected regulatory state is a faithful agent of Congress. Despite the predominance of lawmaking by regulation and the decades-long application of principal-agent theory to the regulatory state, we know very little about whether federal agencies are faithful agents. This article is the first comprehensive investigation into this black box of agency statutory interpretation. The article reports the findings of a 195-question survey of agency rule drafters at seven executive departments (Agriculture, Commerce, Energy, Homeland Security, Health and Human Services, Housing and Urban Development, and Transportation) and two independent agencies (Federal Communications Commission and Federal Reserve). Of the 411 officials sent the survey, 128 responded, and their responses shed considerable light on the tools and approaches they use to interpret statutes and draft regulations. The findings uncovered both challenge some theories on agency statutory interpretation while reinforcing others. As Congress, courts, and scholars gain more insight into how federal agencies use interpretive rules, legislative history, and judicial deference doctrines in agency statutory interpretation, the principal-agent relationship between Congress

and federal agencies should improve as should the judicial branch's ability to monitor and faithfully constrain lawmaking in the Fourth Branch.

Michael Asimow, *Inquisitorial Adjudication and Mass Justice in American Administrative Law*, in The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives (Ashgate, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503177. The United States justice system in general and administrative adjudication in particular is generally perceived as adversarial, meaning that decisions are made in proceedings consisting of trial methods that are largely controlled by the parties rather than the administrative judge. However, inquisitorial methods in administrative adjudication are actually quite common, particularly in Social Security and veterans' claims adjudication. In those mass justice systems, inquisitorial approaches are consistent with (and perhaps even compelled by) the fundamental idea that the government should assist every eligible beneficiary to receive the benefits to which they are entitled. Moreover, these overburdened systems simply could not afford the inefficiencies associated with adversary trials. Beyond those calculations, it may be that in mass justice, and perhaps in many other administrative and judicial systems as well, inquisitorial methods may be more acceptable to the parties than adversarial methods.

Wendy E. Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 Wis. L. Rev. 671 (2013). In this Article, the author uses Neil Komesar's participation-centered model as a tool for gaining new insights into the balance and vigor of pluralistic participation in administrative process. This preliminary investigation exposes a number of ways in which well-meaning administrative process requirements may actually impede, rather than encourage, engagement from a broad spectrum of affected participants. Legal processes that depend on robust engagement from affected groups require rigorous analysis to ensure that they are in working order. Komesar's model provides the type of exploratory tool needed to understand whether these processes are in fact doing what they promise and to troubleshoot how they might go wrong.

Matthew P. Downer, *Tentative Interpretations: The Abracadabra of Administrative Rulemaking and the End of* Alaska Hunters, 67 Vanderbilt L. Rev. forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506689. Agency flexibility is a battlefield. When circumstances change or a new regime takes power, federal agencies often adjust their settled regulations to reflect new realities. There is a persistent struggle, however, between preserving this flexibility and protecting those who relied upon the previous regulations. When an agency changes course, regulated entities must comply, often with little warning and at great expense. In this long-standing conflict, the *Alaska Hunters* doctrine has proven a particularly intractable battlefield. The APA explicitly permits agencies to issue interpretations without going through notice-and-comment procedures. But under *Alaska Professional Hunters v. Federal Aviation Administration*, the D.C. Circuit requires notice-and-comment in order to change definitive interpretations. Since the case was first decided, commentators have detailed compelling justifications for overturning *Alaska Hunters*: its strained reading of the APA, its apparent infringement upon congressional authority, its disruption of the tenuous balance between reliance interests and agency flexibility, its threat to judicial review, and its inconsistency with the Supreme Court's reasoning in *Fox*. While the *Alaska Hunters* doctrine has managed to survive this onslaught, its application may soon draw to a close. The Tenth Circuit recognized that agencies could circumvent the *Alaska Hunters* doctrine through the abracadabra of tentative interpretations. Four D.C. Circuit cases demonstrate the numerous methods of projecting tentativeness. A veritable grab bag of tricks, these methods allow agencies to easily create the appearance of tentativeness in order to preserve flexibility in the event they need to change their interpretations in the future. This perverse incentive undermines the reliability of agency guidance and endangers reliance interests without fully unshackling agency flexibility. Before *Alaska Hunters*, agency flexibility threatened reliance interests. After *Alaska Hunters*, reliance interests threatened agency flexibility. But under the abracadabra gloss, both sides lose. Regulated entities cannot assess the risk of reliance, and agency experts cannot adequately respond to safety concerns. Perhaps the two sides of this struggle are more like warring factions. Once their interests align against the reigning authority, regime change seems inevitable. In short, the abracadabra circumvention might ultimately prove to be the gloss that broke *Alaska Hunters*' back. In its place, extending the *Fox* framework of arbitrary-and-capricious review to interpretive rules would strike a more desirable truce. By constraining definitive and tentative interpretations equally and focusing on the extent of reliance rather than on hints of definiteness, *Fox* would incentivize clear and accurate agency guidance to regulated entities. Under *Fox*, both sides win.

Recent Articles of Interest

Patrick J. Smith, *Changes in Agencies' Interpretations of Their Own Regulations and* Auer *Deference*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506822. *Perez v. Mortgage Bankers Association*, a case currently pending before the Supreme Court, involves the validity of a D.C. Circuit rule relating to the Administrative Procedure Act notice-and-comment requirements for rulemaking. Under the APA, substantive rules are subject to the notice and comment requirements but interpretative rules are not. Under this D.C. Circuit rule, if an agency has adopted an interpretation of one of its own substantive regulations in a guidance document that would not itself otherwise be a substantive rule, the agency must nevertheless use notice-and-comment procedures to change the interpretation. Although the D.C. Circuit has not done so, this rule can be justified based on the *Auer* deference principle under which agency interpretations of their own regulations are given deference similar to the deference that is given under *Chevron* to agency statutory interpretations. Under *Auer*, an agency interpretation of its own regulation can be viewed as having the force of law, and as a result should be viewed as itself a substantive rule, since a substantive rule is a rule with the force of law. As a substantive rule, notice-and-comment procedures are required.

Laurence Tai, *Fast Fixes for FOIA*, forthcoming in Harv. J. On Leg., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507892. The Freedom of Information Act (FOIA) has been hindered throughout its history by delays in processing requests, questionable denials of information, and a dominance of commercial requests. Using an economic approach, this Article argues that cost asymmetries drive these difficulties: agencies incur high costs compared to requesters at the processing stage, whereas the opposite is true at the judicial review stage. To mitigate these asymmetries, this Article proposes three relatively simple changes that would markedly improve the Act's implementation: allowing agencies to retain processing fees, increasing processing fees, especially for commercial and expedited requests, and strengthening FOIA's attorney fee-shifting provisions. This Article contends that these "fast fixes" for FOIA would more effectively strengthen government transparency than the significantly more complex legislation pending in the current Congress.

Robert Knowles, *National Security Rulemaking*, 41 Fla. St. U. L. Rev. 883 (2014). Agencies performing national security functions regulate citizens' lives in increasingly intimate ways. Yet national security rulemaking is a mystery to most Americans. Many rules—like those implementing the National Security Agency's vast surveillance schemes—remain secret. Others are published, but the deliberations that led to them and the legal justifications for them remain hidden. Ordinarily, these rules would undergo the Administrative Procedure Act's notice-and-comment process, which has earned wide, if not universal, praise for advancing democratic values and enhancing agency effectiveness. But a national security exception from notice-and-comment in the APA itself, along with the overuse of classification authority, combine to insulate most national security rulemaking from public scrutiny and meaningful judicial review. The result is a national security administrative state that is insular and unaccountable to the public. Some scholars find this exceptional treatment inevitable, while others have proposed reforms. But no one has sought to provide a full accounting of national security rulemaking's scope and historical origins. By doing so, this article demonstrates that the APA exception is historically contingent—a response to the rise of totalitarian states and the Second World War. As a product of its time rather than an essential attribute of all administrative law systems, it is a relic in a globalized world in which the foreign and the domestic are increasingly intertwined, and the line between national security and ordinary rulemaking therefore begins to fade entirely. This article suggests reforms that would increase public deliberation in national security rulemaking, while accounting for the importance of secret-keeping when truly necessary. Among these proposed reforms is a change to the current practice allowing national security agencies to invoke the security exception to notice-and-comment after a rule is challenged in court, rather than at the notice-and-comment stage itself. These reforms would improve the current rulemaking practice, which undermines the transparency necessary for effective democratic participation.

Joseph Benjamin Landau, *Due Process and the Non-Citizen: A Revolution Reconsidered*, 47 Conn. L. Rev. forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500985. *Mathews v. Eldridge* is typically understood to be a ruling limiting due process protections in benefits determinations, but this case of judicial restraint in ordinary domestic law has activist features where non-citizens are concerned. The transplantation of *Mathews* into the critical areas of immigration and national security has produced a body of law that is slowly ushering in rights-affirming outcomes and weakening conventional doctrines of exceptionalism in immigration and national security. There are two chief reasons for this. First, ever since *Mathews* required an explicit judicial determination of private interests, courts have used an increasingly particularistic,

case-by-case analysis in immigration and national security that supplants traditional, group-based inquiries into sovereignty, citizenship, and territoriality. Second, because *Mathews* requires a judicial assessment of the merits of various policies, courts have become much more actively involved in considering—and, at times, constraining—administrative and quasi-administrative action. Although courts still frequently yield to government interests in immigration and national security cases—*Mathews* has not caused a sea change in due process protections—the "Mathewsization" of both fields has changed the judicial role, with payoff for individual rights. Moreover, this payoff extends beyond the courts, for the coordinate branches, too, are experiencing a Mathewsization of sorts. In a world defined by fractious institutional power grabs, the new due process has prevented executive and congressional overreach, stimulating a new legal-process-oriented methodology of inter-branch coordination in areas of law once defined by extreme deference to the judiciary.

Michael Greve and Ashley C. Parrish, *Administrative Law Without Congress: Of Rewrites, Shell Games, and Big Waivers*, forthcoming in G. Mason L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2514484. Administrative law has ceased to respond adequately to the challenges posed by modern-day executive government. We suggest that the discordance reflects a mismatch between the debilities of the Congress and an administrative regime built on legislative supremacy. Administrative law—in its New Deal and its modern, post-*Chevron* forms—presuppose a Congress that is jealous of its legislative powers. However, the modern Congress has increasingly dis-empowered itself. It consistently fails to update old statutes even when they are manifestly outdated or, as actually administered, have assumed contours that neither the enacting nor the current Congress would countenance. When Congress does legislate, it tends to enact highly convoluted and often incoherent "hyper-legislation." The article examines the effects first on agencies, and then on courts and their doctrines. Knowing that there is no turning (back) to Congress, agencies are tempted to improvise policies lacking legislative authority. In turn, administrative law doctrines that were developed under very different institutional conditions start to bend. The article describes three increasingly common forms of agency action: (1) agency "re-writes" of statutes; (2) procedural shell games and manipulation; and (3) broad regulatory waivers without or in excess of a statutory warrant. It provides illustrations in the "old statutes" and "hyper-legislation" settings. The principal old-statute example is the Clean Air Act and the protracted litigation over the EPA's regulation of greenhouse gases, culminating (for now) in the Supreme Court's decision in *Utility Air Regulatory Group v. EPA*. The principal examples of hyper-legislation are the Dodd-Frank Act and the Affordable Care Act, including the pending litigation over the scope of the act's subsidy and mandate provisions. The article concludes with a plea for more institutional realism and less interpretive metaphysics in administrative law.

Abbe R. Gluck, *What 30 Years of Chevron Teach Us About the Rest of Statutory Interpretation*, 83 Fordham L. Rev. forthcoming, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2515855. *Chevron*, the most famous rule of administrative law, is also a central doctrine of statutory interpretation. But *Chevron* is understood and operates quite differently from most of the other statutory interpretation rules. This Essay explores six such divergences and how they illuminate of some the most important, unanswered questions of the statutory era. First, thirty years of *Chevron* highlight the enduring puzzle over the legal status of statutory interpretation methodology in general. *Chevron* is a "precedent;" the remaining statutory interpretation doctrines do not even rise to the status of 'law." But second, *Chevron*'s own fate is inextricably tied to these other rules, because *Chevron* relies on them in its famous two-step test. Critics blame *Chevron*'s manipulability, but arguably the blame lies more with the legal indeterminacy of all of the other statutory interpretation rules upon which *Chevron* relies. Third, as the *Chevron* doctrine has evolved, it has become more attendant to the realities of how Congress drafts statutes—realities in which the Court seems wholly uninterested when it comes to the rest of statutory interpretation. Relatedly, the Court shows no shame in acknowledging *Chevron*'s source; the Court created the doctrine. The jurisprudential status of the other interpretive rules, however, remains ambiguous, with the federal courts loathe to admit that they have fashioned a common law of statutory interpretation. Fourth, *Chevron*, as further developed by *Mead*, is the one instance in which the Court has explicitly used interpretive doctrine to influence the procedures that Congress uses. Again in contrast, across the rest of the statutory landscape, the Court has refused to enter the sausage factory, continuing to reject the idea that courts should interfere in the lawmaking process, or that how a law is made should affect its interpretation. Fifth, *Chevron*'s evolution has blown a hole through conventional notions of statutory stare decisis, but at the same time the Court now seems afraid that it has given away too much. Today, agency statutory interpretations may displace judicial precedents but, when agencies are not in the picture, the Court hoards power: it gives its own statutory precedents "super"

stare decisis effect; is stingy when it comes to interpreting congressional overrides; and won't cede any control over interpretive rules to any other branch. Finally—and this is a shared feature—both *Chevron* and the rest of the statutory interpretation rules rest on an outmoded, "Schoolhouse Rock!" understanding of Congress and agencies that is no more, if it ever was. Thirty years of *Chevron* thus reveal a statutory law–landscape in remarkable flux, and a Court making few connections between the closely linked administrative and statutory domains.

Caroline Cecot and W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, forthcoming in G. Mason L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519139. This article evaluates judicial review of agency benefit-cost analysis ("BCA") by examining a substantial sample of thirty-eight judicial decisions on agency actions that implicate BCA. Essentially, the Administrative Procedure Act tasks federal courts with ensuring that federal agency action is reasonable. As more agencies use BCA to justify their rulemakings, the court's duty often requires judges to evaluate the reasonableness of agency BCAs. This article discusses the challenges that trigger judicial review of agency BCAs and the standards that govern the review. It then presents specific examples of how courts analyze BCAs. Overall, it finds many examples of courts promoting high-quality and transparent BCA. Courts have been willing to question BCA methodology and assumptions and request more transparency on these issues. As agencies rely more on BCA in their decisionmaking, judicial review of BCA will be increasingly important. The stakes are high. Additional judicial oversight can be valuable—but bolstering any oversight effort to provide a policy check can also impose societal costs if desirable policies are delayed or left unimplemented. Ideally, efforts to foster greater judicial review should be structured so that the enhanced role of the judiciary itself passes a benefit-cost test. Armed with this article's examination of the state of judicial review of BCA, scholars can more effectively evaluate the impact of judicial checkpoints on the use of BCA in agency decisionmaking and assess whether shifting more regulatory oversight authority to the courts would be an effective approach to fostering more welfare-enhancing policies.

Miriam Seifter, *Federalism at Step Zero*, 83 Fordham L. Rev. 633 (2014). Given the extensive interconnections between state and federal actors and laws in the administrative sphere, it should be no surprise that administrative law cases—cases often involving the application of *Chevron*—frequently raise federalism questions. This Essay considers what courts should do when the worlds of *Chevron* and federalism collide. The Supreme Court has at times indicated that *Chevron* does not apply in its usual way in certain federalism cases, and a number of scholars have proposed similar approaches in particular contexts. Because these proposals all require analysis before the *Chevron* framework is deployed, I refer to them collectively as a "Federalism Step Zero." This Essay identifies Federalism Step Zero as a distinct concept, analyzes its underpinnings and mechanics, and ultimately, argues against its adoption. The analysis focuses on the mismatch between the nature of Step Zero and the nature of federalism analysis in the administrative context. Step Zero is best served by a rule rather than a standard, a lesson evident in the aftermath of *United States v. Mead Corp.* and apparently part of the doctrine after *City of Arlington v. FCC*. But the heterogeneity of questions and goals at stake in administrative federalism cases makes bright lines a poor fit. No rule can identify accurately when agencies should answer federalism questions—and because agencies are well-positioned to resolve many such questions, there is no reason to believe that categorically denying deference would better serve federalism goals. Moreover, courts can already police bad agency interpretations through *Chevron* analysis and arbitrary and capricious review. A Federalism Step Zero would thus needlessly harm the coherence and predictability of the *Chevron* framework.

Ronald A. Cass, *Viva La Deference? Rethinking the Balance between Administrative and Judicial Discretion*, forthcoming in the G. Wash. L. Rev., available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516596. America's constitutional structure relies on checks and balances to prevent a concentration of excessive discretionary power in the hands of any individual governmental official or body, promoting effective government while protecting individual liberty and state sovereignty. Federal courts have been sensitive to threats to upend this balance of power where one branch of the federal government intrudes on powers assigned to another but less so to changes that increase federal power overall—including, notably, unchecked discretionary power of administrative officials. An elastic commerce clause and ineffective nondelegation doctrine leave judicial review of administrative action for consistency with statutorily assigned tasks as an especially important safeguard. The *Chevron* doctrine, however, as it has often been deployed, grants deference to a large number of administrative actions on a fictive supposition that Congress intentionally conferred discretionary authority for those actions. Although the doctrine is defended, reasonably, as constraining a different sort of discretionary government authority—resting in the hands of judges rather than administrators—*Chevron* deference has reduced the effectiveness of review as a limitation on administrative power. This article looks at the changes in constitutional limits on official power, the function of the *Chevron* doctrine, and potential alternatives as a check on discretionary administrative power, concluding that a stronger requirement of actual grants of discretion is more legally defensible and more consistent with the rule of law.

2015 Section Awards

Annual Award for Scholarship (2015)

Each year, the ABA Section of Administrative Law and Regulatory Practice recognizes the best work of administrative law scholarship for the prior year. Eligible books and articles are those that were published (copyrighted) during 2014.

In general, publications worthy of the Section's award should be:

1. well written, since publications that are informative and develop new ideas need not be difficult to read;
2. tightly reasoned, with a clear analysis that does not detour from development of the main thesis of the argument;
3. broadly applicable to at least several programs or issues;
4. provide a new and timely insight into a current issue of administrative law;
5. provide a new theoretical construct that will aid in the understanding or development of administrative law or develop a practical recommendation for solving a problem of administrative law; &
6. contain a minimum of repetition or recitation of existing work.

The award recipient is selected by early June, announced soon thereafter, and the award winner is invited to the Section's Administrative Law Conference held in Washington, DC at the Walter E. Washington Convention Center on October 29-30, 2015.

Please submit your nomination package to:
The ABA Section of Administrative Law
and Regulatory Practice
1050 Connecticut Avenue NW, Suite 400
Washington, D.C. 20036

Email: anne.kiefer@americanbar.org or fax to 202-662-1529.

Please direct inquiries to Section Director Anne Kiefer at 202-662-1690.

2015 Gellhorn-Sargentich Law Student Essay Award Competition

Created in 2006, the Gellhorn-Sargentich Law Student Essay Award Competition honors the memory of two men who left us too soon, Ernest Gellhorn, a distinguished law dean, administrative law professor, and practitioner who was Chair of the Section; and Thomas Sargentich, a distinguished administrative law professor at American University's Washington College of Law who was a great friend of the Section.

Topic

The entry must discuss any topic relating to administrative law.

Eligibility

The competition is open to currently enrolled students of ABA-accredited law schools who are also members of the ABA Section of Administrative Law and Regulatory Practice. Submissions can include papers submitted for a law school course, law review notes and comments, or pieces written specifically for the competition. Essays must be the work of the submitting student without substantial editorial input from others. Co-authored papers are ineligible. Only one essay may be submitted per entrant.

Judging

The entries will be judged anonymously by Fellows of the ABA Section of Administrative Law and Regulatory Practice. Entries will be judged on the following criteria:

- Creativity and clarity of the proposal or thesis
- Organization
- Quality of the analysis and research
- Grammar, syntax and form

Prize

The winner will receive a $5,000 cash prize and round-trip airfare and accommodation to attend the Section's Fall Conference in Washington, DC. At the discretion of the Section and the respective editorial boards, the winning entry may be selected for publication in the *Administrative and Regulatory Law News* and/or the *Administrative Law Review*. As a condition of receiving the award, winner agrees to submit a completed W-9. Winner is responsible for all taxes associated with receiving the award. The Fair Market Value of award, travel and accommodation will be reported on a 1099-MISC.

continued on page 40

2015 Mary C. Lawton Award for Outstanding Government Service

Created in 1989, the Mary C. Lawton Award for Outstanding Government Service honors the memory of Mary Lawton, a distinguished career government lawyer who served on the Council of the Administrative Law Section from 1983-1986, and as Chair of the Section's Judicial Review Committee from 1986 to 1988. A graduate of Georgetown Law School where she was first in her class and on the Board of Editors of the Law Journal, Mary began her career in the Office of the Legal Counsel in the Department of Justice. At DOJ, she rose through the ranks to become a Deputy Assistant Attorney General. She received numerous awards from the Department of Justice. After a brief stint as General Counsel of the Corporation for Public Broadcasting and service as Administrative Law Officer at the White House, Mary returned to the Justice Department as Counsel for Intelligence Policy.

Eligibility

The Mary C. Lawton Award for Outstanding Government Service is presented annually by the American Bar Association's Section of Administrative Law and Regulatory Practice. The nomination should be based on outstanding contributions to the development, implementation, or improvement of administrative law and regulatory practice that reflects sustained excellence in performance. This is an extremely prestigious award, and we hope that you will give thoughtful consideration to this request for nominees. There are relatively few honors for government attorneys that recognize them for the "body of their work." Past recipients of the Award have spoken of this recognition as being a career capstone, and we are privileged to recognize their service. All government attorneys active in the fields of administrative law and regulatory practice are eligible. While career officials generally will be favored, exceptional political appointees also will be considered. Nominations are being solicited from federal government agency general counsels, state attorneys general, and other officials, as well as from members of our Section and the ABA Government and Public Sector Lawyers Division.

Judging & Winner Notification

The entries will be judged by the Mary C. Lawton Award Committee of the ABA Section of Administrative Law and Regulatory Practice. The Committee holds its review meetings in May and June of 2015, and an award winner will be selected by August 2015. While we recognize that all of the individuals nominated for this award are most worthy, we select only one winner each year, and that winner is chosen at the sole discretion of the Section and its Awards Committee. The Section Director will contact all Nominators once a winner has been selected. The Nominator for the winning nominee will be given the opportunity to share the news with the award winner. Entries will be judged on the following criteria:

- Mentoring activities in the administrative law and regulatory practice area
- Length of professional service
- Level of responsibility in positions held
- Discrete, significant accomplishments such as teaching experience; scholarship; participation in professional activities; and other awards or recognition.

Prize

The winner will receive a commemorative framed certificate and an invitation to the Section's Fall Conference Awards Luncheon or Dinner on October 29 or 30, 2015 at the Walter E. Washington Convention Center in Washington, DC. We work with agency ethics counsel and this award has generally been deemed to be acceptable for covered officials. We ask the winner to share with our attendees (usually 600 government attorneys) their experiences and observations over a long career, and we have found these presentations to be very enlightening and rewarding for all concerned. The Section also honors the winners of several other awards during this luncheon. For any questions or concerns, please contact Anne Kiefer anne.kiefer@americanbar.org or 202.662.1690.

Officers, Council and Committee Chairs

Officers, Council, & Liaisons

Officers

Chair: Anna Williams Shavers*
Chair-Elect: Hon. Jeffrey A. Rosen*
Vice Chair: Renée M. Landers*
Secretary: Linda D. Jellum*
Budget Officer: Hon. Edward J. Schoenbaum*
Section Delegates: Hon. H. Russell Frisby, Jr.*
Ronald M. Levin*
Last Retiring Chair: Hon. Joe D. Whitley*

* Executive Committee Member

Council

Member 2015: Jeffrey Clark
Louis George
Kevin M. Stack
Kathryn Watts

Member 2016: Jack M. Beermann
James P. Gerkis
Ryan Nelson
Carol Ann Siciliano

Member 2017: Jane C. Luxton
William S. Morrow, Jr.
Connor Raso
David Rostker

Ex-Officio

State Administrative Law: Hon. Errol Powell
Executive Branch: Jeffrey G. Weiss
Judiciary: Hon. A. Raymond Randolph
Legislative Branch: Daniel Flores
Administrative Judiciary: Hon. Julian Mann III

Liaisons

ABA Board of Governors: Hon. Joseph B. Bluemel
Young Lawyers Division: Christopher R. Fortier
Law Student Division: William Haeberle

Administrative Process Committees

Adjudication
Co-Chairs: Carla Gunnin
Christopher J. Walker

Constitutional Law and Separation of Powers
Chair: Anne Joseph O'Connell

Corporate Counsel
Co-Chairs: Richard DeSanti
Ryan Nelson
Karyn Schmidt

Collaborative Governance
Chair: Richard Parker

E-Government (formerly E-Rulemaking)
Chair: Cary Coglianese

Government Information and Right to Privacy
Chair: Bernard W. Bell

Intergovernmental Relations
Chair: Jeffrey B. Litwak

Judicial Review
Co-Chairs: Richard W. Murphy
Adam J. White

Legislation
Co-Chairs: James W. Conrad Jr.
Paul Noe

Regulatory Policy
Co-Chairs: Jonathan G. Cedarbaum
Jennifer Alisa Smith

Rulemaking
Co-Chairs: Brian Callanan
Connor Raso

State Administrative Law
Chair: Hon. Errol H. Powell

Government Functions Committees

Amicus
Chair: David Frederick

Antitrust
Chair: Aaron Nielson

Banking and Financial Services
Co-Chairs: John F. Cooney
Christine C. Franklin

Benefits
Co-Chairs: Hon. Jodi B. Levine
Tom Sutton

Beverage Alcohol Practice
Co-Chairs: Tracy Genesen
Charles Smarr

Communications
Co-Chairs: Emily Schleicher Bremer
Brendan Carr

Consumer Products Regulation
Co-Chairs: David H. Baker
Eric Rubel

Criminal Process
Chair: Nancy Eyl

Education
Chair: Caroline Newcombe

Elections
Co-Chairs: Elizabeth Howard
Chris Winkelman

Energy
Co-Chairs: Jeffrey Clark
Kenneth G. Hurwitz

Environmental and Natural Resources Regulation
Co-Chairs: Richard Parker
Richard Stoll

Federal Clean Energy Finance
Chair: Warren Belmar

Food and Drug
Co-Chairs: James T. O'Reilly
Katherine Van Tassel

Government Personnel
Co-Chairs: Joel P. Bennett
Andrew Perlmutter

Government Relations and Legislative Process
Chair: Jack Hughes

Health and Human Services
Co-Chairs: Jane B. Burke
Vanessa Burrows

Homeland Security and National Defense
Co-Chairs: Joe D. Whitley
Evan Wolff

Housing and Urban Development
Chair: Otto J. Hetzel

Immigration and Naturalization
Chair: Kate Kalmykov

Insurance
Chair: Janet Belkin

Intellectual Property
Chair: Arti K. Rai

International Law
Co-Chairs: Neysun Mahboubi
David Zaring

International Trade & Customs
Co-Chairs: Leslie Alan Glick
Reeve Bull

Labor and Employment
Chair: Robert J. Hickey

Ombuds
Co-Chairs: Bennett Feigenbaum
Daniel Rainey

Postal Matters
Chair: Ian David Volner

Securities, Commodities and Exchanges
Co-Chairs: James Gerkis
Fiona Phillip

Transportation
Chair: Jacqueline Glassman

Veterans Affairs
Chair: Michael Viterna

Young Lawyers
Chair: Christopher R. Fortier

Section Activities Committees

Administrative & Regulatory Law News
Editor-in-Chief: Cynthia A. Drew

Administrative Law Review
Editor-in-Chief: Wenxi Li

Annual Awards Committee on Outstanding Government Service
Co-Chairs: Elaine S. Reiss
John Cooney

Budget
Chair: Hon. Edward J. Schoenbaum

CLE
Chair: Andrew Kloster

Committee on Scholarship
Chair: Russell L. Weaver

Developments in Administrative Law
Co-Editors: Jeffrey Lubbers
Michael Tien

Diversity
Chair: Jennifer Smith

Fellows
Chair: Michael Herz

Fundraising
Chair: Hon. Joe D. Whitley

Membership and Communications
Chair: Louis George

Nominations
Chair: James W. Conrad, Jr.

Pro Bono
Chair: Michael E. Herz

Publications
Chair: William S. Jordan III

Technology
Chair: Justin Hurwitz

Seasonal Meetings
Fall Conference: Andrew Emery
Carol Ann Siciliano

Homeland Security
Law Institute: Joe D. Whitley

Ad-Hoc Committees

Review of Recruitment of ALJ's by OPM
Chair: John Vittone

Homeland Security Coordinating Committee
Chair: Joe D. Whitley

ADMINISTRATIVE & REGULATORY LAW NEWS

Volume 40, Number 2, Winter 2015
Published by the Section of
Administrative Law and Regulatory Practice
American Bar Association
1050 Connecticut Avenue NW, Suite 400
Washington, DC 20036

Defending Liberty
Pursuing Justice