Biting The Data Quality Bullet: 
Burdens On Federal Data Managers Under New Section 515 

By Jim O'Reilly*

The weather forecast for Oct. 1, 2002 is gloomy and overcast in Washington, at least inside the offices of managers who have charge of their agencies' information processing functions. Under guidance from OMB implementing agencies must be ready Oct. 1 to respond to public petitions for the correction of agency data that lacks "quality, objectivity, utility [or] integrity." Petitions are very likely to be used to request substantive alteration of the underlying data, a prospect that rings alarms at controversial federal agencies. If judicial review of petitions is allowed, as many expect, new forms of collateral attack on agency decisions may result in 2003 and beyond.

At the Section's Spring Meeting in Richmond on April 19, a panel of experts hosted by the Government Information & Privacy Committee explored the alternative prospects for "data quality" challenges. Dr. Jim Tozzi, former Deputy Administrator of OMB's Office of Information & Regulatory Affairs (OIRA) and now a Washington consultant, authored the original drafts in 1999, and in 2000 found a welcoming sponsor in House Appropriations member Rep. Joanne Emerson. Though critics like OMB Watch offered their alternative terms, the Tozzi proposal was adopted as Section 515 of Public Law 106-554 and the "data quality" process becomes mandatory for all agencies on Oct. 1, 2002.

Tozzi energetically defended section 515 against its critics. Data quality is the expected norm of agency behavior, not an abstract ideal; all agencies' data sets that are maintained or disseminated should already be meeting norms of "quality, objectivity, utility and integrity." How that compliance with norms is to be accomplished in specific sets of data – ranging from pure scientific results to opinions, forecasts and projections of the economic or health futures – will be the subject of individual agency rules in summer 2002. Tozzi urged participation and public input to the agency rules and guidelines.

Mark Greenwood of Washington's Ropes & Gray expects the district courts to review agency denials of a 515 petition for data correction. Tozzi and Greenwood told the crowded meeting room that Section 515 provides "law to apply" to agency denials of petitions, provides a process that reaches a final agency decision, and has a clear definition of "dissemination," facilitating judicial review of 515 petition denials. Greenwood observed that if an agency study is issued and has some independent effect, then a challenger's petition for correction of the study conclusion or data will be taken to judicial review.

Greenwood cautioned the audience to differentiate section 515's judicial review issue from the agency internal processing of petitions. Although the process of petition review will be comparable to existing reviews under the Paperwork Reduction Act, where OIRA can overrule an agency, the new section 515 is not an amendment of the PRA, so its mechanisms are not inhibited by the PRA's ban on judicial review of decisions to approve collections of information. Rather, the 515 mechanisms are like those of the normal APA adjudication of petitioners' claims about an agency decision, evoking the 1979 *Chrysler v. Brown* issues on the roughly parallel set of "reverse-Freedom of Information Act" disputes.

Insights into the new data quality norms were also offered by Greenwood. Science policy will be affected because OIRA's leadership will force agencies to make choices within models, assumptions, etc. that pay closer attention to the incoming data's scientific adequacy. Agency default assumptions that are built into a model can now be changed by petition from the persons affected, if the assumptions can be shown to lack "quality" or

---

* *Professor of Law, University of Cincinnati Law School; Chair, Committee on Government Information & Privacy.*
Nominations for 2002-2003

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

Chair-Elect: Thomas Morgan
(Washington, DC) — Oppenheimer Professor of Law at George Washington University. Tom has served on the Section’s Council. Recently, he has been our representative to the Ethics 2000 and other related ABA efforts respecting professional responsibility. He is a former Dean at Emory Law School, past-President of the Association of American Law Schools, and a widely respected scholar on regulation and administrative law issues. He is an author or co-author of casebooks on regulation (with Paul Verkuil), antitrust, and professional responsibility.

Vice Chair: William Funk
(Seattle, WA) – Professor of Law, Lewis & Clark Law School. Bill has been a past member of the Section’s Council, a Chair of the Federal Register, Reports and Paperwork Committee, and a Vice Chair of the Judicial Review and Rulemaking Committees. He currently is the Editor of the Administrative & Regulatory Law News and a member of the Publications Committee. He has been a frequent speaker at Section programs and served as Reporter on Government Management for the APA Project.

Council:
Michael Asimow (Los Angeles, CA) – Professor of Law, UCLA Law School. Michael has long served as Co-Chair of the State Administrative Law Committee and Associate Editor of the Administrative & Regulatory Law News. He is also the Section Liaison to National Conference of Commissioners on Uniform State Laws. He was Reporter for Adjudication in the APA Project.

Anne E. Dewey (Washington DC) – Special Advisor to the Office of Federal Housing Enterprise Oversight. Anne is the Section Representative to the Government and Public Sector Lawyers Division and a Co-Chair of the Banking and Financial Services Committee.

Anna W. Shavers (Lincoln, NE) – Professor of Law, University of Nebraska Law School. Anna is Chair of the Immigration and Naturalization Committee and the Section Liaison to the ABA Coordinating Committee on Immigration Law.

Loren A. Smith (Washington, DC) – Senior Judge, U.S. Court of Federal Claims. Loren is a Section Fellow and former Chair of the Administrative Conference of the United States.

David C. Vladeck (To fill a vacancy) (Washington, DC) – Public Citizen Litigation Group. David was the Co-Reporter for Openness in the APA Project and has been a frequent speaker at Section programs.

Secretary:
Jonathan Rusch (Washington, DC) – Special Counsel for Fraud Prevention, US Department of Justice. Jonathan has been a Council Member, Chair of the Antitrust and Trade Regulation Committee, and Chair of the Criminal Law and the Administrative Process Committee. He currently is Assistant Secretary and Co-Chair of Regulatory Initiatives.

Delegate:
Judith S. Kaleta (Washington, DC) – Senior Counsel for Dispute Resolution, U.S. Department of Transportation. Judy has been a Council Member, a Chair of the Ombudsman Committee, and a Co-Chair of the Meetings Committee. She currently is Vice Chair of the Transportation Committee, Chair of the Long-Range Planning Committee, and Section Representative to the Commission on Women in the Profession.

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

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

Executive Branch
Viet Dinh (Washington, DC) – Assistant Attorney General for Legal Policy, U.S. Department of Justice.

State Administrative Law
Jim Rossi (Durham, NC) – Professor of Law, Florida State University Law School.

Administrative Judiciary
Ann Young (Washington, DC) – Administrative Judge, U.S. Nuclear Regulatory Commission.
Chair’s Report
Section Chair C. Boyden Gray opened the Spring Meeting with a brief discourse on the need for a Section sponsored project on international administrative law. Gray noted the emergence in Europe of a brand of administrative process that is opaque and does not embrace the concept of judicial review. He predicts that as global trade expands we will see a migration of these rules to the United States. Gray sees a role for the Section in facilitating an understanding of European administrative process and promoting much needed transparency. He cautioned that “over time, the Section will become marginalized by global rule-making if we do not act now.” Gray foresees the effort as a multi-year project along the lines of the Section’s APA Project.

Delegate’s Report
Delegate Ernie Gellhorn commented briefly on some of the preliminary House agenda items for the 2002 Annual Meeting.

Gellhorn indicated he was inclined to support a recommendation from the Steering Committee on the Unmet Legal Needs of Children, agenda item #106. The recommendation supports full implementation of the 1999 Foster Care Independence Act through appropriate state legislation in order to provide youth up to age 21 transitioning out of the foster care system full access to all necessary services. Conversely, he indicated that he would oppose a recommendation sponsored by the Section of Taxation as lying outside the profession’s purview. Agenda item #102, recommends that Congress provide adequate funding to the Low Income Taxpayer Clinic (“LITC”) program under Section 7526 of the Internal Revenue Code of 1986 to clarify that LITC funding should not be considered only as seed money but also a source of continued funding.

Gellhorn said two recommendations needed further study and advised referring them to the appropriate Section committees. He asked that a recommendation sponsored by the Commission on Homelessness and Poverty, the Senior Lawyers Division, the Steering Committee on Unmet Legal Needs of Children and the Commission on Legal Problems of the Elderly, be referred to the Section’s Banking and Financial Services and Antitrust and Trade Regulation Committees. The recommendation, agenda item #109, urges federal, state, territorial and local governments and other appropriate entities to enact legislation, develop initiatives and take action to curb abusive, deceptive or fraudulent lending practices, also known as predatory lending, to defend the rights of those who are disproportionately victimized: the elderly, low income, and minorities.

He also requested that agenda item #101, sponsored by State Bar of Georgia Delegate Gregory S. Smith, be referred to the Constitutional Law and Separation of Powers Committee. That recommendation urges Congress to adopt a law allowing for private persons to file civil actions in the name of the United States Government, using non-privileged information to allege that funds or payments are being or have been made to organizations officially recognized by the President of the United States as terrorist organizations.

Finally, Gellhorn said he would consult with Delegate Ron Cass on a recommendation from the Section of International Law and Practice, House agenda item #119, that Congress and the President enact amendments to the Foreign Sovereign Immunities Act (“FSIA”) to address language in the statute that has caused conflicting judicial decisions, ambiguities and confusion. The recommended amendments address the interpretation of application of the FSIA, including: the scope of application of the Act to government entities, officials, and corporations; exceptions from immunity; and service and execution provisions.

Data Quality Guidance
The council approved the recommendation of the Government Information and Right to Privacy Committee that the Section submit comments under blanket authority in a select number of agency rule-makings that propose guidelines for implementing the data quality provisions of Section 515 of the Treasury and General Government Appropriations Act for FY 2001, Pub. L. No. 106–554.

The Office of Management and Budget (OMB) has issued government-wide guidelines under Section 515 which direct each federal agency to establish and implement written procedures to ensure and maximize the quality, utility, objectivity and integrity of the information that they disseminate. See 67 Fed. Reg. 8,451 (Feb. 22, 2002). The council approved the sub-
mission of comments that focus on proposed agency mechanisms that do not comply with the OMB guidelines.

Former Section chair and current committee chair Jim O’Reilly informed the council of the significance of these rulemakings and said he expects the committee will want to sponsor a panel at the fall conference on what the agencies have done on this issue.

**Publications**

Publications Committee chair Randy May reported year-to-date profit of $25,000 on book sales through February of this year. He reviewed sales and marketing efforts on the Section’s books and noted that The Cost-Benefit State would be featured in ABA publications. He expects that Eleanor Kinney’s book on Medicare coverage will be out later this summer. The Black Letter Statement on Adjudication, edited by APA Project Reporter Michael Asimow, should be out this fall. A book covering the administrative law of multinational organizations and comparative administrative law of our nation’s major trading partners, proposed by Kathleen Kunzer, is still in the planning stages. He said that the Section had renewed for another five years its contract with American University Washington College of Law for sharing the cost of publishing the Administrative Law Review.

**Membership**

Membership Committee chair Myles Eastwood reported that Section membership was still above 9000 and on the rise. The committee’s written report bestowed special thanks on committee member Christine Monte for helping to organize Section participation in two Law Student Division circuit meetings and for writing an excellent article in the Student Lawyer on the benefits of Section membership, on Michael Herz and James Seff for speaking at those meetings, on Renee Landers for speaking to students at a recent SOC Roadshow at Suffolk Law School and on committee members Judy Kaleta and Eleanor Kinney for lending a hand with Christine’s article. Eastwood said the Section would join in an ABA telethon in May 2002 that would be conducted by the ABA Membership Department.

**Small Business Impact Memo**

The council approved the drafting of a letter to officials at OMB’s Office of Information and Regulatory Affairs (OIRA) and SBA’s Office of Advocacy (Advocacy) concerning a March 19, 2002, Memorandum of Understanding (MOU) between the two agencies mutually pledging coordinated enforcement of provisions in the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. (RFA), that require federal agencies to analyze the impact of proposed regulations on small businesses.

The MOU establishes an information sharing process between the two agencies when a draft rule-making is likely to impact small entities. The MOU provides that, in cases where OIRA is uncertain regarding a draft rule’s impact on small business or agency compliance with RFA, OIRA may provide a copy of the rule to Advocacy for evaluation. Further, in the case of a draft rule for which Advocacy has concerns in this regard, the MOU requires OIRA to provide Advocacy with a copy of the draft rule and allows OIRA to provide Advocacy with the regulatory analyses accompanying the draft rule. Finally, the MOU states that if, in the judgment of OIRA or Advocacy, an agency’s compliance with RFA is inadequate, OIRA will return the rule to that agency for further consideration.

Some council members believe the information sharing process established in the MOU raises two issues. First, as Advocacy represents the interests of small business, their review of agency draft regulations would be based upon information gathered from small businesses. Thus, Advocacy’s review could provide a limited group of interested parties with the ability to comment on a rule at a draft stage and outside the agency’s record. This would be especially problematic if such “conduit” comments lead OIRA to return a rule to the agency. Second, the RFA authorizes Advocacy’s Chief Counsel to appear as amicus curiae in a suit challenging an agency’s regulations on RFA grounds. Significant separation of powers and confidentiality issues are raised if the Chief Counsel had an opportunity to review that same rule when it was subject to Executive branch review at OIRA.

**U.S. Consensus Council**

Former Section chair Phil Harter briefed the council on the Dispute Resolution Section’s solicitation of cosponsors of a recommendation that the ABA support enactment of legislation that would establish the U.S. Consensus Council. Harter explained that the council would consist of political appointments and be funded initially with a $5 million appropriation. The function of the independent, nonprofit organization would be to

*continued on page 20*
The Future of Electronic Rulemaking: A Research Agenda

By Jeffrey S. Lubbers*

When offering an agenda for the future it is sometimes a good thing to revisit previous diagnoses. In 1996, I participated in a symposium about the administrative law agenda for the next decade [49 Admin. L. Rev. 159, 165-66 (1997)]. I noted that electronic rulemaking had already begun and asked, “Will we be shortly seeing global rulemaking complete with chat rooms and word searches of all records?” I then suggested that, “This area is going to require some enlightened and balanced policymaking mixed with technical expertise. We all know that lawyers and techies often do not get along; however, this is one area where communication across the professions is necessary.”

We have come a long way in those six years. Government websites have become enormously useful. The online Federal Register, Code of Federal Regulations (C.F.R.), and Unified Agenda of Federal Regulatory and Deregulatory Actions have eclipsed the paper versions in a few short years. And the Electronic Freedom of Information Act Amendments of 1996 have geometrically increased the amount of information provided proactively by agencies.

Technology is moving at its usual rapid clip. But legal developments are moving more slowly, and there is still a wealth of e-rulemaking issues for administrative law scholars, with the help of their technologically adept colleagues to study.

In trying to catalog and perhaps order these issues for future researchers, I believe the main issue is nothing less than how to design a transformation of the rulemaking process as a whole.

This transformation has two main purposes. The first is an informational one of providing a global seamless view of each rulemaking. By “global,” I mean both a horizontal view—meaning access to every meaningful step in the generation of a rule, from the statute enacted by Congress that authorizes the rule, to the earliest agency action (perhaps an “advance notice of proposed rulemaking”), to the last step in the process—whether it be the final rule, a decision in a court challenge, or later agency amendments, interpretations, guidelines, or enforcement actions. This will require proper docket definition and numbering so that agencies can properly catalog these actions and so that interested viewers can be sure that everything is there. By everything, I would include not just the text of the proposed and final rules, but the public comment files, preambles, ex parte communications, videotaped or audio taped public hearings, OMB review documents, “SBREA” review panel documents, relevant impact statements, models, risk assessments, Congressional review documents, relevant court proceedings, etc. A good first step is to make sure at least that proposed and final rules are linked.

What constitutes a “meaningful step” should ideally be determined by the user as much as possible. Since many new rulemakings grow out of older rulemakings, or have implications for other concurrent rulemakings, a truly seamless view should permit users to search across past or current rulemakings, to find connections, analogies, and consistencies (or inconsistencies).

In addition to this chronological view, I also mean a vertical view, what might be called “boring down” into the meaningful agency and outside studies and analyses that are now found in the docket, along with the public comments, for any significant proposed and final rule—and, where possible through links, into those secondary studies and analyses referenced in the primary studies. And so on.

To fully implement this vision, it would be helpful for agencies to place archival records on-line. This can be done to some extent retrospectively with existing rules, if existing paper records currently in regular agency dockets are scanned, and made accessible through the new e-rulemaking systems. If done comprehensively and carefully, this could be an expensive proposition. But with the advent of electronic rulemaking, this sort of “forward” archiving should become much more feasible in the future.

The second purpose of the transformation of rulemaking is a participatory one—making it possible for participants to participate in real time with other stakeholders in a rulemaking process, (the glorified “chatroom”) that will allow a more rational, interactive, and less adversarial path to an optimum final rule.

* Senior Fellow, Section of Administrative Law and Regulatory Practice. Fellow in Law and Government, Washington College of Law, American University. Research Director, Administrative Conference of the U.S., 1982-1995. This article is based on a presentation at a Working Session on Information Technology and Rulemaking sponsored by the Regulatory Policy Program, John F. Kennedy School of Government, Harvard University, and the National Science Foundation (March 26, 2002).
Both the informational and the participatory goals have some stumbling blocks to which research should be directed.

Taking the informational goal first, here are some questions:

• How should we best integrate existing sources of information? The Office of Federal Register now is able to constantly update the electronic C.F.R.—which in itself is a great boon to anyone who needs to know what government regulations are in effect at the moment. Should there be an agency (perhaps in the National Archives and Records Administration) that tries to integrate all of these documents electronically—the Federal Register, C.F.R., Unified Agenda—to begin with? In other words, should there ultimately be a single U.S. Government Rulemaking Portal?

• What about the gloss that agencies are constantly adding to codified rules through non-legislative rules? Some years ago I commented on an interesting article by Professors Hamilton and Schroeder of Duke University [57 Law & Contemp. Probs. 111, 161 (1994)]. They had catalogued all of EPA's hazardous waste regulations under the Resource Conservation and Recovery Act that appeared in the C.F.R. by counting each C.F.R. decimal point number as a separate rule. This yielded 697 separate rules. Then they examined all of the related agency guidance documents (office directives, guidance memos, and hotline responses) since the beginning of the program and matched them with the appropriate C.F.R. rule. Some rules, they discovered, had many associated guidances; some had none. This was done by a consulting firm, by hand, and it must have been a tedious task in the early 90s. But it could be done fairly easily now—leading to a sort of "C.FR. Annotated.”

• What about docketing issues?
  1. Should written (paper) comments be scanned immediately so that a complete on-line docket is available? Is there still some loss of search capability and some risk of errors with scanning? Or is this susceptible to a technological solution?
  2. Archiving issues. Do (redundant) paper copies need to be kept? How about cover e-mails?
  3. How should exhibits, forms, photographs, etc be dealt with?
  4. Barbara Brandon has highlighted [54 Admin. L. Rev. no 3, (forthcoming)] the need to deal with copyright concerns—both where the submitter asserts a copyright in his or her own comments, and where the submitter includes copy-righted work without permission. How should these knotty issues be resolved?

5. The OMB has recently issued new guidelines on the quality, objectivity, utility, and integrity of information disseminated by federal agencies [67 F.R. 369 (Jan. 3, 2002)]. Will these structures (including the requirement that agencies establish appeal mechanisms to resolve disputes over the accuracy of the data) limit agency willingness to provide wider electronic access to agency rulemaking documents?

6. Should there be different levels of user classifications? So that one type of participants (like agency staff) could see everything, but others might have more limited access? Should agencies be allowed to ask viewers to register?

7. Have we finally solved the digital signature issue?

8. Security issues have become of heightened concern—both in terms of preventing unauthorized tampering, and in making sure that sensitive information is not made available to potential terrorists.

9. A slew of privacy issues are presented. Should anonymous comments be permitted? Ought commenters be identified or searchable by name? Should the names of submitters be indexed? This would seem to transform agency rulemaking files into “systems of records” under the Privacy Act. Doesn't this mean that OMB must approve such “systems”? Should such files be exempted from the coverage of the Act?

10. What legal impediments prevent agencies from requiring e-comments to the exclusion of paper comments?

The participatory goal also raises some important issues:

• How can we best reach the goal of better, more targeted notices—through electronic listservs?
• Can we also provide easier, more convenient comment opportunities, through linking “pop-up” comment forms to electronic notices of proposed rulemakings?
• What rules should govern rulemaking “chat-rooms”?
  1. Should they be moderated or not (and by whom?)
  2. First Amendment concerns: as Barbara Brandon has highlighted, some participants, especially anonymous ones, can be very disruptive through “incivility, aimlessness, or high-volume posting.” How to best combat this?

continued on page 22
**By William Funk**

**Court Further Explicates and Applies *Chevron/Mead***

In several near-the-end-of-term cases the Court had occasion to review agency legal interpretations according to one or another standards of judicial deference.

Certainly the most significant on the merits was *Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1753 (2002), which upheld the FCC's TELRIC (total element long-run incremental cost) pricing regulations governing the provision by incumbent telephone local exchange carriers of services and equipment to requesting new entrant competitors as well as FCC regulations requiring the incumbent local exchange carriers to "perform functions necessary to combine" network elements for a new entrant. Both had been set aside by the Eighth Circuit as not authorized by the Telecommunications Act of 1996.

The TELRIC issue was whether the statutory requirement that pricing be based upon "the cost . . . of providing the . . . network element" meant that the pricing had to be based upon some actual cost incurred by the incumbent local exchange carrier (the carriers' position) or whether it could mean a hypothetical cost that would occur in a perfect market (the approach taken by the FCC regulation). The Court in an opinion by Justice Souter, with only Justice Breyer dissenting, held that the term "cost" was ambiguous and that the FCC's interpretation was reasonable, a standard *Chevron*, USA, Inc. v. NRDC, 467 U.S. 837 (1984) analysis.

For devotees of the intricacies of the *Chevron* doctrine, however, there are elements of the Court's analysis that might be said to further cloud the one-time clarity of the *Chevron* doctrine. That is, in determining whether the TELRIC regulation "exceed[ed] reasonable interpretive leeway," the Court sometimes seemed to be answering an interpretive question (as when it addressed whether the purpose of the regulation was consistent with the purpose of the 1996 Act) and sometimes seemed to be answering a different question: whether the TELRIC regulation was arbitrary and capricious (as when it addressed whether the effect of the regulation would further the purposes of the statute). There are commentators who believe that the second step of *Chevron* ought to be a determination whether the challenged regulation is arbitrary and capricious, with only step one being a question of statutory interpretation.

See, e.g., Ronald Levin, The Anatomy of *Chevron*: Step Two Reconsidered, 72 Chi.-Kent L. Rev. 1253 (1997). However, nothing in Justice Souter's opinion for the Court suggests a conscious decision to adopt such a framework. Rather, the argumentation for the reasonableness of the FCC's interpretation simply seems to be confused with the reasonableness of the regulation on the record, as when in a footnote Justice Souter responds to Verizon's "additional argument" that the TELRIC regulation was arbitrary and capricious: "this is simply a restatement of the argument that the FCC was unreasonable in interpreting [the Act]." Indeed, the opinion also breaks new ground by supporting the reasonableness of the regulation on the basis of post-regulatory facts, demonstrating that adoption of the regulation has not thwarted achievement of its goals. "At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law . . . founders on fact." Justice Breyer, dissenting from the TELRIC decision, did not use a *Chevron* analysis; instead, he based his opinion on the approach of *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 563 U.S. 29 (1983), which did not involve a question of statutory interpretation but whether the rescission of the airbag rule was arbitrary and capricious. Justice Souter's footnote response did not recognize this difference; indeed, he seemed to believe they involved the same sort of inquiry except that, in his words, *State Farm* "may be read as prescribing more searching judicial review" because there the agency was changing its course.

This is not the first instance of a court failing to clearly distinguish between a *Chevron* analysis, which in its original formulation was simply a question of whether a regulation as a matter of statutory interpretation is within statutory authority, and a *State Farm/Overton Park* analysis in which a regulation, on the basis of the rulemaking record, is assessed for its reasonableness in the sense of whether it will actually achieve its stated purpose. For example, in *Verizon*, the prior question could be answered by asking whether hypothetical costs could in theory further the purposes of the Act; the latter question, however, could only be answered by looking at the rulemaking record to see if there is a reasonable basis for concluding that using hypothetical costs will in fact further the purposes of the Act. It is entirely possible that a positive answer to the first question could be given but the record would not provide substantiating evidence of what the actual effects of the regulation would be, leading to the regulation being overturned as arbitrary and capricious.

Whether these two separate analyses are characterized

---

* Professor of Law, Lewis & Clark Law School; Editor-in-Chief, *Administrative & Regulatory Law News*. 
as *Chevron* steps one and two, as suggested by Levin, or in this author’s preference as *Chevron* and *State Farm/Overton Park* analyses, it would be helpful if courts recognized that there are two separate analyses involved, each of which uses different tools and asks different questions.

The other issue dividing the Court was whether the statutory statement that incumbent local exchange carriers are to provide network elements “in a manner that allows requesting carriers to combine such elements” allowed for a regulation that requires incumbents themselves to combine the elements when new entrants are not able to combine them. While Justice Scalia joined Justice Breyer in dissenting on this point, the Court dismissed the notion that the language foreclosed such a regulation. The Court focused on the underlying purpose of the statutory provision— to facilitate interconnections by making combination of network elements feasible. It did not read the language as intending to stymie that purpose when it was not feasible for the new entrant to make the combination but it would be feasible for the incumbent to make it on behalf of the new entrant.

Justice Souter again applied *Chevron* in a unanimous opinion for the Court in *Chevron USA, Inc. v. Echazabal*, 122 S.Ct. — (2002). Here the issue was whether the EEOC’s regulation allowing employers not to hire a person for a job who, in light of his disability, would be a danger to any person, including the person himself, was a reasonable interpretation of the Americans with Disabilities Act. The Act specifically provides only that employers are allowed not to hire persons who, because of their disability, would “pose a direct threat to the health or safety of other individuals in the workplace.” The Ninth Circuit invoked the canon of *expressio unius exclusio alterius* to hold, contrary to the Eleventh Circuit, that the EEOC’s regulation was beyond the statutory authority. Without invoking any doctrine of judicial deference to the EEOC’s interpretation, the Court found that the canon should not apply here because the Court found that the statutory language was merely “an example of legitimate qualifications that are ‘job-related and consistent with business necessity,’” not an exclusive statement of an exception. Moreover, the Court said, an “essential . . . ingredient” of the canon is “a series of terms from which an omission bespeaks a negative implication,” and hence there was no series of terms. Finally, the statutory history (the previous language of and practice under the Rehabilitation Act) did not support a limitation to an exclusive exception.

Consequently, the Court found that “Congress has not spoken exhaustively on threats to a worker’s own health,” and therefore “the agency regulation can claim adherence under the rule in *Chevron* if it is reasonable. Interestingly, the opinion then listed a number of reasons why the employer would view the regulation as reasonable, including the fact that it would enable the employer to avoid the risk of violating the Occupational Safety and Health Act, if it employed a worker under circumstances that would pose a health risk to the employee. The legitimacy of the concern with respect to the OSH Act alone, the Court said, “will be enough to show that the regulation is entitled to survive.”

Probably the most significant case with respect to the *Chevron/Mead* doctrine was *Barnhart v. Walton*, 122 S.Ct. 1265 (2002), if only because here the Court was forced to focus on the contours of the doctrine by a Scalia concurrence. The issue in the case was whether the Social Security Administration’s regulation interpreting provisions of the Social Security Act was valid. Mr. Walton was diagnosed as schizophrenic and became disabled, losing his job. However, eleven months later, although still suffering from mental illness, he was able to obtain employment in a different job. The question was whether he qualified for Social Security Disability and Supplemental Security Income payments. The statute defines “disability” as an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

Grammatically, the 12-month requirement only applies to the physical or mental impairment, but the Social Security regulation requires that the person be unable to engage in substantial gainful activity for not less than 12 months. Walton suffered from a mental impairment that lasted more than 12 months, but he was able to engage in substantial gainful employment after only eleven months. The Fourth Circuit, contrary to two other circuits, held that the statute was clear and unambiguous, precluding the regulation.

The Supreme Court reversed. Conceding that the statutory language only required a 12-month period for the disability, Justice Breyer, for the Court, concluded that this left open and therefore ambiguous whether and to what extent there was a minimum

*continued on page 23*
D.C. Circuit extends Buckhannon to FOIA cases
In Buckhannon Bd. & Care Home Inc. v. W.Va. Dep't of Health & Human Res., 532 U.S. 598 (2001), the Supreme Court held that to obtain attorneys fees under the fee shifting provisions of the Federal Housing Amendments Act and the Americans with Disabilities Act a person must be a “prevailing party,” meaning that it was awarded some relief by a court, either in a judgment on the merits or in a court-ordered consent decree. In Oil, Chemical and Atomic Workers International Union v. Dep't of Energy, 288 F.3d 452 (D.C. Cir. 2002), the court over Judge Judith Rogers dissent held the same was required under the attorneys fee provision of the Freedom of Information Act. Prior to Buckhannon, the D.C. Circuit had used the “catalyst theory” under which attorneys fees would be awarded if the litigation substantially caused the requested records to be released. Using that approach and prior to Buckhannon, the district court had awarded fees to the union in light of the fact that its suit had resulted in DOE providing the documents, culminating in a stipulated consent order of dismissal. After Buckhannon, however, the court said that only a court order granting relief would enable the award of attorneys fees, noting that the Supreme Court had cited in Buckhannon to a number of similar fee shifting provisions, including the FOIA. Here the court order had dismissed the suit, thereby not granting relief, albeit in light of DOE’s providing of the documents.

The court was not moved by the difference in language between the statutes in Buckhannon, which use the term “prevailing party,” and the language in the FOIA, which uses the term “substantially prevailing.” Both, the court said, have the same meaning. The court was also not moved by the recognition that the necessary effect of such a ruling would be to allow the government to avoid attorneys fees in FOIA cases simply by providing the documents at the last moment in the litigation before a final order of disclosure, presumably even during appeal.

D.C. Circuit Finds EPA “Guidance” an Improperly Promulgated Legislative Rule
D.C. Circuit hostility to agency use of guidance documents rather than notice-and-comment rulemaking found another expression in General Electric Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002). The Toxic Substances Control Act governs the use of PCBs. EPA has adopted regulations governing the cleanup and disposal of PCB waste. Under the regulations a person may apply for permission to use a method other than those identified in the regulations, and EPA will approve it if the alternative method does not pose “an unreasonable risk of injury to health or the environment.” EPA has also issued a Guidance Document identifying the risk assessment techniques a person may use in seeking approval of an alternative waste disposal method. The Guidance Document states that either of two different methods of risk assessment are acceptable. GE challenged the Guidance Document on the grounds that it was not adopted after notice-and-comment.

TSCA requires challenges to “rules” under TSCA to be brought in the D.C. Circuit within 60 days of promulgation. EPA argued that this provision did not apply to interpretive rules and statements of policy, even thought they might be “rules” within the definition of the APA. The court, however, said that it had jurisdiction because, on the merits, it determined that the Guidance was a legislative rule. In addition, the D.C. Circuit found that the Guidance was ripe for review because the issue was “largely a legal, not a factual, question,” and there is no requirement for hardship, when the question is factual and Congress has expressed a preference for pre-enforcement review, which it had here with respect to “rules.”

On the merits, the court said that the guidance was a legislative rule because it denied the decisionmaker discretion by limiting applications for alternative PCB waste disposal techniques to two acceptable risk assessment methodologies. Thus, the Guidance had legally binding effect at least on the agency. EPA argued that its own characterization of the Guidance was that it was not binding and that the Guidance itself states that some risk assessments may require the use of non-standard methods, not provided for in the Guidance. The court, however, quoted various places in the Guidance that used the word “must,” suggesting that persons were required to follow one of the two methodologies in the Guidance, and the allowance for an exception in non-standard cases did not “undermine the binding force of the Guidance Document in standard cases.”

Second Circuit Defers to Secretary of Labor’s Interpretation that a Federal Rule of Civil Procedure Does Not Apply to OSHRC Proceedings, Contrary to Other Circuits
Under the Occupational Health and Safety Act, the Occupational Safety and Health Review Commission is to hold its proceedings “in accordance with the Federal Rules of Civil Procedure.” The OSH Act also provides that if an employer does not contest a citation for an alleged violation by filing a notice of contest with the Secretary within 15 working days after receiving notice of the citation, the citation shall be deemed a final order. In Chao v. Russell P. Le Frois Builder, Inc., — F.3d —
(2d Cir. 2002), a secretary of an employer lost the notice of citation when it slipped behind the seat of her car. It was discovered two months later, and the employer then promptly filed a notice of contest, explaining the reason for the delay. OSHRC applied what it said was its longstanding precedent and excused the delay under the authority of Federal Rule 60(b), which provides that a court may excuse a party “from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect.” The Secretary, however, maintained that OSHRC lacked jurisdiction over the notice of contest because the 15-day period had expired.

The court referred to Martin v. OSHRC, 499 U.S. 144 (1991), in which the Court held that courts should defer to the Secretary rather than to OSHRC, because Congress delegated to OSHRC only “the type of non-policymaking adjudicatory powers typically exercised by a court in the agency-review context.” Of course, in Martin the interpretive issue involved the meaning of the Secretary’s own regulation applying the substantive provisions of the OSH Act. Consequently, the Second Circuit concluded that “[b]ecause Congress delegated rule-making authority under the OSH Act to the Secretary,” it is the Secretary, rather than OSHRC, that has the authority to interpret the statute with respect to the question at hand. Having concluded that deference was due the Secretary, the next question was whether that deference should be strong, Chevron deference or weak, Skidmore deference. Because the Secretary’s position had only been articulated in the instant litigation, the court held that it was not entitled to Chevron deference. Applying Skidmore, the court said the Secretary’s view “merits deference” in light of the “delicacy and importance of the Secretary’s role.” Institutional competence thus militates in favor of deference to the Secretary’s view.” The Secretary’s view was that Rule 60(b) did not apply because the OSH Act says the FRCP only apply to proceedings before OSHRC, but there could be no proceeding before OSHRC, because the failure to timely file a notice of contest resulted in a final, unappealable order. The court recognized that some other circuits had found OSHRC jurisdiction over certain late-filed notices of contest, but it was not persuaded. Judge Pooler dissented.

D.C. Circuit Rejects Civil Rights Commission’s Theory of Term Appointments

President Clinton appointed Victoria Wilson to fill the vacancy left in the Civil Rights Commission by the death of an incumbent. Her commission stated that the appointment was “for a term expiring on November 29, 2001,” the date on which the previous incumbent’s term would have ended. When that date came, however, Ms. Wilson did not leave, and when President Bush appointed a replacement, the Commission refused to seat him, on the theory that there was no vacancy to be filled. The statute governing appointments states that “term of office of each member of the Commission shall be 6 years.” Accordingly, the Commission maintained that Ms. Wilson’s appointment was for 6 years from the date of her appointment, January 13, 2000. In United States v. Wilson, 290 E3d 347 (D.C. Cir. 2002), the court held that the statute’s language was not unambiguous, because the word “term” could have either of two meanings: the period of personal service (as maintained by Ms. Wilson and the Commission) or the fixed slot of time to which individual appointees are assigned (as maintained by the United States and the new appointee). Recognition of these two separate meanings of the term is longstanding, as reflected in an Attorney General’s opinion of 1882. To determine which of these two meanings was the correct one, the court looked to the history of the Commission and the practice that had been followed. The Commission conceded that, when a member had completed a full term but was not reappointed, and the new appointee was appointed some time after the end of the previous member’s full term, the new appointee’s term could be calculated from the end of the previous appointment. This concession, while it clearly undercut the Commission’s general theory, was necessary because of the uninterrupted practice of the Commission over its history. Moreover, the prior statutes governing the composition of the Commission had provided explicitly for staggered terms, and the newest version was not accompanied by any expression of an intent to change this system, and some language of the current statute could be interpreted to express an intent to retain the staggered terms. To allow the word “term” to mean the period of personal service, rather than a fixed slot of time, would erode the staggered terms, and, where the issue has arisen, every other multimember agency with staggered terms has interpreted the “term” to be a fixed slot of time. Accordingly, the court held that the Commission’s term was a fixed slot of time, which for Ms. Wilson ran out on November 29, 2001.

9th Circuit Sides with 3d, Contrary to 1st and 7th, Holding That State Agencies Cannot Be State Courts for Purposes of the Removal Statute

An employee filed a discrimination complaint against U.S. West with the Oregon Bureau of Labor and

continued on page 26
by Michael Asimow*

Taking a Step Toward Better Local Government Adjudication

Local government adjudication is the black hole of administrative law. Local agencies can generally select any procedure they want to use, subject only to rarely-applied due process requirements. That rare lightning struck in *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 45 P.3d 280 (2002). In this case, the California Supreme Court held that a pro tem hearing officer was tainted by financial bias.

Haas had a massage parlor license which the County wanted to revoke because an employee had caught soliciting acts of prostitution. The attorney representing the County selected Abby Hyman as the hearing officer. Hyman was a local in-house insurance lawyer. She had never met Haas or the County attorney and had never before served as a hearing officer. She was paid the standard County hourly rate for her services.

The Court held that Haas was denied due process because Hyman had an incentive to decide the case for the County. The idea is that if she decided to revoke the license, she would have a good chance to be selected as a hearing officer in future cases, but if she refused to revoke it, she probably would not get hired again. The Court thought that this sort of financial bias resembled the classic case of *Tumey v. Ohio*, 273 U.S. 510 (1927), which overturned a decision imposing a fine by the town mayor who was permitted to pocket any fines he imposed. However, Hyman’s interest seems far more remote than the mayor’s in *Tumey*.

In prior cases, both the California and U.S. Supreme Courts have held that an appearance of bias is not sufficient to overcome the presumption that an administrative judge will decide a case fairly. But *Haas* says this “mere appearance” rule is not applicable to cases of financial bias. The presence of a possible financial incentive to decide the case for the County was enough to disqualify Hyman without any further showing that she might be biased.

The decision will force numerous local governments in California to change the ways they select hearing officers. They can no longer select hearing officers on an ad hoc basis and pay them by the hour. They might hire state central panel hearing officers (which is quite costly) or establish their own fulltime hearing officers (even if they don’t have enough cases to keep a hearing officer busy). Perhaps they could hire pro tem hearing officers if an ordinance provided that the officer could not be again appointed for a lengthy period of time. Despite the cost and inconvenience to local government, *Haas* will improve the quality of local government decisionmaking by professionalizing the hearing officer function. This will help to ensure fair local government hearings for generations to come.

New Mexico Courts Interpret New Process for Judicial Review of Administrative Actions

The new uniform rules in New Mexico governing judicial review of administrative actions include a significant and controversial change in existing appellate procedures. (see *Admin. & Reg. Law News*, vol. 25, no. 3 and vol. 26, no. 3). The rules provide that, after the first record review of an administrative action by the district court, the appeal from the district court to the Court of Appeals is by writ of certiorari, thus granting discretion to the Court of Appeals to review or not review administrative appeals. NMSA 1978, § 39-3-11.E. In two recent decisions, the New Mexico Court of Appeals first upheld the constitutionality of the new process, and then significantly narrowed its own scope of review of administrative actions.

In *Vandervossen v. City of Espanola*, 2001-NMCA-16, 130 N.M. 287, 24 P.3d 319 (2001), an appellant argued that the statute providing the Court of Appeals with discretionary review violated the provision in the New Mexico Constitution granting a party “an absolute right to one appeal.” N.M.Const. Art.VI, Sec. 2. After a lengthy discussion, the Court of Appeals upheld the constitutionality of the new statute. The primary justification was that the constitutional right attached only when the district court was acting in its “original” jurisdiction (i.e., acting as a civil or criminal trial court), and not when the district court is acting in its appellate jurisdiction. The Court found that the review of an administrative action by the district court is a “special” statutory proceeding and not part of the district court’s original jurisdiction.

In *C.F.T. Development, LLC v. Torrance County*, 2001-NMCA-69, 130 N.M. 775, 32 P.3d 784 (2001), the Court of Appeals significantly narrowed its scope of review of administrative decisions when the review is by a writ of certiorari to the district court under the new statute. Because the Rules of Appellate Procedure specify the grounds for granting a writ of certiorari (NMRA 2001...
Rule 12-505), the Court of Appeals found that its scope of review is thus limited to the grounds on which it grants certiorari. Since the grounds are limited to either conflicts with previous decisions or laws, significant constitutional questions, or issues of significant public interest, the Court of Appeals determined that its review could not include many elements of the traditional administrative scope of review. Now, issues such as whether the administrative decision was arbitrary or capricious or an abuse of discretion or not supported by substantial evidence can only be decided by the district court.

**Washington State Rushes in Where Washington DC Refuses to Tread**

The State of Washington has adopted an Ergonomics Rule (WAC 296-62-051) in the wake of the repeal of the federal rule (See PL 107-5 [SJR 6] March 20, 2001). The Rule establishes a process through which technologically and economically feasible measures to reduce repetitive stress injuries can be identified and employed. Estimates are that 50,000 Washington employees are affected by such injuries annually. In 2001, the Governor appointed a special Blue Ribbon Panel—composed of national public health experts, representatives of labor and management and others—which was charged with studying the fairness, clarity and enforceability of the Rule. The final report of the Blue Ribbon Panel was issued in March, 2002. The report gave the Rule a green light on all counts. The Governor has announced a 2-year delay in the effective date of the Rule to allow businesses additional time to prepare for implementation. Many proponents of the rule were disappointed at the delayed implementation but are prepared for implementation. Many proponents of the rule were disappointed at the delayed implementation but are counting on the Governor’s assurance that the rule is alive and well and will, in fact, go into effect in two years.

**Administrative Law Judges Deserve Clear Ethical Rules**

The states should adopt ethical codes for their ALJs, whether they work in central panels or for the agencies for which they decide cases. In 2001, the ABA adopted Resolution 101B, urging state and local governments to require that members of the administrative judiciary be accountable under provisions similar to the ABA’s Code of Judicial Conduct.

The ABA’s action follows the actions of a number of states including Colorado, Georgia, Iowa, Minnesota and South Carolina that have adopted the CJC for ALJs. Other states, including California, Kentucky, Missouri, North Carolina, North Dakota and Oregon have established ethical codes specifically for ALJs that are modelled on the CJC. Other states, especially including New York, should follow suit.

**Recent Articles**


**ABA Connection September 18: Going to School on Education Law**

On September 18, 2002 at 1:00 p.m. Eastern, the ABA Connection is presenting a one-hour CLE teleconference titled, “Going to School on Education Law.” Legal issues are rampant throughout the education field that directly affect parents, students, teachers and administrators on a regular basis. Among those issues are student discipline; religious freedom and accommodation; open meetings and elections for school boards; privacy issues; tort liability for school; and special education requirements. This article will focus on key recent developments in some of those areas. The program is a no-cost benefit of ABA membership and is co-sponsored by the Section of Administrative Law and Regulatory Practice and its Education Committee. Continuing Legal Education credit has been applied for in states that accept the teleconference format. To register, call the ABA at 1-800-285-2221 from 8:30 a.m. to 6:30 p.m. Eastern time, weekdays, beginning Monday, July 22nd, or register online by Friday, August 16th at www.abanet.org/CLE/connection.html. If you are unable to participate in the live teleconference the program is available, at no cost, for one month, on the ABA CLE Web Site at http://www.abanet.org/cle/connection.html. Tapes of the program are available to ABA members for $50.00 two weeks after the program. To order a tape call the ABA Service Center at 1-800-285-2221.

---

*The information in this article was provided by Patricia E. Salkin, Associate Dean of Albany Law School and Director of the Government Law Center.*
*The information for this article was provided by Professor William R. Andersen, University of Washington Law School.*
Registration
Registration for section meeting activities must be received by Thursday, July 25, 2001, so that your name may be included in the pre-registration list given to all attendees. To register, please visit the Section website at www.abanet.org/adminlaw/calendar. The deadline for advance ABA registration is Thursday, July 11, 2002.

Hotel Reservations
The deadline for housing is Monday, July 8, 2002. I.T.S. is the only source for Official ABA Housing. I.T.S. can be reached at 800-421-0450. I.T.S. will acknowledge your reservation request in writing within two weeks of receipt of your ABA registration form. You must be registered for the ABA meeting in order to receive official housing. Please note that the rate at the Park Hyatt Hotel is $210.00

THURSDAY AUGUST 8, 2002

Fever or Chill? Taking the Temperature of the Administrative Judiciary in an Era of Reform (CLE Credit Available)
3:00 p.m. - 4:30 p.m. • Mayflower Hotel, 1127 Connecticut Ave., NW, The Rhode Island Room, 2nd Floor.
Sponsors: Judicial Division – National Conference on Administrative Law Judges, Section of Administrative Law and Regulatory Practice, Senior Lawyers Division, Young Lawyers Division, Labor and Employment Law Section

Significant momentum has been developing for major efforts to reorganize the way the administrative judiciary functions at both state and federal levels. A distinguished panel will update lawyers and judges on the status of specialty courts, central panels, corps of judges, and other major efforts including pending legislation, the Administrative Law and Regulatory Practice Section’s examination of the Administrative Procedures Act, and the ABA’s Model Central Panel Act.

Access to Drugs During Public Health Crises (CLE Credit Available)
2:00 p.m. to 5:00 p.m. • JW Marriott Hotel, 1331 Pennsylvania Ave., NW, Capitol Ballroom Salon D, B Level
Sponsors: Section of Administrative Law and Regulatory Practice, Special Committee on Bioethics and the Law, Section of Health Law, Section of Intellectual Property Law, International Health Law Committee, Section of International Law and Practice

The program will focus on the current perception of the ethical and legal conflict between pharmaceutical company patent rights in new drugs and urgent public health needs, in two contexts: 1) the public health needs of developing countries such as South Africa, in their battles against devastating diseases such as AIDS, and 2) the public health needs of developed countries such as the United States and Canada when facing bioterrorist threats such as anthrax.

Jill Be Nimble Part II- Forging Ahead (Women Rainmakers) (CLE Credit Available)
2:00 p.m. - 4:00 p.m. (with reception to follow) • Marriott Wardman Park Hotel, 2660 Woodley Road, NW, CLE Centre
Sponsors: Section of Administrative Law and Regulatory Practice, Law Practice Management Section, Section of Real Property, Probate and Trust Law, Section of
A panel of experienced women lawyers will discuss how NIMBLE looks, DC style in an informal, motivational and interactive program. They will discuss the benefit to their careers and rain-making prowess of movement between the federal government and the private sector and how these moves enabled them to maximize their skill sets and personal and professional power. Hear how they do it, how they got there, and how they like it. Topics will include: shaping your skills to fit the role, networking by building bridges, recognizing dead end situations, and who they have to thank for their success.

FRIDAY, AUGUST 9

Section Registration and Welcome
1:00 p.m. – 5:30 p.m. • The Park Hyatt, Ballroom Level

Negotiating in the Face of Terrorism (CLE Credit Available)
2:00 p.m. – 3:30 p.m. • Marriott Wardman Park Hotel, 2660 Woodley Road, NW, CLE Centre
Sponsors: Section of Administrative Law and Regulatory Practice, Section of Dispute Resolution
The United States has always played a pivotal role in the efforts to negotiate peace in the Middle East. From the formation of Israel in 1948, the role of the United States and its European allies has been a central force shaping the relationships of the Israel, its Arab neighbors, and the Palestinians. This panel discussion will focus on the appropriate role of the United States and its ability to foster negotiations in the Middle East in the face of terrorism.

Whatever Happened To Broadband? (CLE Credit Available)
2:00 p.m. – 3:30 p.m. • Marriott Wardman Park Hotel, 2660 Woodley Road, NW, CLE Centre
Sponsors: Section of Administrative Law and Regulatory Practice, Section of Science & Technology Law
The landmark 1996 Telecommunications Act held out the promise of a pro-competitive national telecommunications policy that quickly would deliver high speed internet access, streaming, real time video communications and other sophisticated broadband services to the general public. However, more than six years later - despite significant advances in technology - the promise remains largely unfulfilled. This program will examine the technological, financial, business, regulatory and legal conditions which have impeded the development and deployment of advanced broadband communications services.
issues of the Ombuds office receiving confidential information and the issue of “notice” to institutions. This panel will draw from a variety of viewpoints to address an area of the law that is evolving and has implications on the issues of confidentiality, privacy as well as notice.

Program Chair: Sharan Levine, Counsel to Ombuds, Levine & Levine, Kalamazoo, MI
Moderator: Philip Harter Director, Program on Consensus, Democracy & Governance, Vermont Law School, South Royalton, VT
Speakers:
* Sharan Levine, Counsel to Ombuds, Levine & Levine, Kalamazoo, MI
* Elizabeth Pino, Director of Ombuds Programs, McKenzie and Company, Boston, MA
* Toni Robinson, Ombudsperson, Massachusetts Institute of Technology, Boston, MA
* Jeff Senger, Deputy Senior Counsel for Dispute Resolution, U.S. Department of Justice, Washington, DC

Section Reception
Co-Sponsored by the Judicial Division – National Conference on Administrative Law Judges
6:00 p.m. – 7:30 p.m. • the home of C. Boyden Gray in Georgetown

Section Dinner
7:45 p.m. – 10:00 p.m. • the home of C. Boyden Gray in Georgetown

SATURDAY, AUGUST 10

Section Continental Breakfast
8:00 a.m. – 9:00 a.m. • The Park Hyatt, Ballroom

Section Council Meeting
9:00 a.m. – 10:00 a.m. • The Park Hyatt, Ballroom

State Sovereign Immunity from Privately-Initiated Federal Agency Adjudications (No CLE Credit Available)
10:00 a.m. – 11:30 a.m. • The Park Hyatt, Ballroom

Last May’s Supreme Court decision in Federal Maritime Commission v. South Carolina State Ports Authority is one of the most important administrative law decisions of the past decade. The 5-4 decision holds that Congress cannot create a regulatory scheme in which administrative law judges adjudicate private claims against states. Justice Thomas’ opinion states that the similarities between the decisionmaking processes of federal judges and ALJs are “overwhelming.” This panel will evaluate the South Carolina case from several perspectives.

Program Chair and Moderator: Michael Asimow, Professor of Law Emeritus, University of California Los Angeles School of Law, Los Angeles, CA
Speakers:
* Warren Dean, Partner, Thompson and Coburn, Washington, DC
* Judith Resnik, Arthur Liman Professor of Law, Yale Law School, New Haven, CT
* Hon. John Vittone, Administrative Law Judge, Department of Labor, Washington, DC

Education Law and the Supreme Court (CLE Credit Available)
9:30 a.m. – 11:00 a.m. • Marriott Wardman Park Hotel, 2660 Woodley Road, NW, CLE Centre
Sponsors: Section of Administrative Law and Regulatory Practice, Division of Public Education, Section of Individual Rights and Responsibilities

The panel will analyze the Supreme Court’s treatment of school policy in the 2001-2002 Term by examining four landmark cases that will affect teachers, students, parents - and their lawyers - for years to come:

Human Clones and The Law: From Embryos and Stem Cells to Duplicate and Designer Babies (CLE Credit Available)
9:30 a.m. – 12:00 p.m. • Marriott Wardman Park Hotel, 2660 Woodley Road, NW, CLE Centre
Sponsors: Section of Administrative Law and Regulatory Practice, Section of Science & Technology Law

This program addresses cloning, embryo stem cell research, and genetic enhancement of human beings. The scientific underpinnings of these technologies will be explained, as well as the implications for lawyers in the fields of health law, drug approval, technology transfer, family law, intellectual property law, individual rights law, and international law.
CEELI Luncheon
12:00 p.m. • Marriott Wardman Park, 2660 Woodley Road, NW, Marriott Ballroom, Lobby Level

National Association of Women Lawyers Luncheon
12:00 p.m. • Omni Shoreham, 2500 Calvert Street, NW, Regency Ballroom, Level 1B

Zero Tolerance Policies and the Constitution: First Amendment, Fourth Amendment and Equal Protection Concerns (No CLE Credit Available)
2:00 p.m. – 3:45 p.m. • Omni Shoreham, 2500 Calvert Street, NW, Capitol Room
Sponsors: Section of Administrative Law and Regulatory Practice, Section of Science & Technology Law

Public school districts across the country in recent years have enacted zero tolerance policies to address concerns of school violence. Zero tolerance policies have been described by its proponents as prohibiting potentially violent behavior with a guaranteed response with little or no exceptions to protect the safety of the school and its occupants. Responses range from reprimand to expulsion. Critics argue there is no flexibility and such sweeping policies deny students their due process rights. The application and effectiveness of zero tolerance policies, and the constitutional concerns that have followed the policies throughout the various courts will be addressed.

HIPPA Enforcement and Litigation Risk Management: The Crisis Ahead (CLE Credit Available)
2:00 p.m. – 3:30 p.m. • Marriott Wardman Park Hotel, 2660 Woodley Road, NW, CLE Centre
Sponsors: Section of Administrative Law and Regulatory Practice, Section of Science & Technology Law

The initial deadline for enforcing HIPAA's new privacy, security and transaction requirements for health care is looming in April of 2003, with an intermediate deadline of October, 2002. Not all the industry will be ready, and substantial disruptions to cash flow may occur. This panel explores the enormous new civil and criminal litigation exposure that HIPAA creates, and offers attorneys practical ways to help prepare their clients for these pervasive new risks, as part of implementing HIPAA quickly and effectively.

ABA President’s Reception
7:00 p.m. – 10:00 p.m. • National Space and Air Museum, 7th and Independence Ave., SW

SUNDAY, AUGUST 11

Section Continental Breakfast
8:00 a.m. – 9:00 a.m. • The Park Hyatt, Ballroom

Section Council Meeting
9:00 a.m. – 11:30 a.m. • The Park Hyatt, Ballroom

Margaret Brent Luncheon
12:00 p.m. • Marriott Wardman Park, 2660 Woodley Road, NW, Marriott Ballroom, Lobby Level,
Speaker: U.S. Representative Eleanor Norton Holmes

MONDAY AUGUST 12

ABA Pro Bono Publico Awards Luncheon
12:00 p.m. • Omni Shoreham, 2500 Calvert Street, NW, Regency Ballroom
Speaker: Former First Lady Rosalynn Carter

Attendance at all programming and events require registration to the 2002 ABA Annual Meeting. Some CLE courses and ABA events will require additional fees. Please check with the primary sponsor of each session for additional information. Primary sponsors are in bold type under each program listing. For more details about the 2002 ABA Annual Meeting, visit http://www.abanet.org/annual/2002/home.html

We thank meeting sponsors Wiley, Rein and Fielding and Sidley, Austin, Brown & Wood LLP for their generous support.
Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. LEGIS. 1 (2002). This article addresses the nature of executive power as it relates to the issuance of executive orders and other presidential directives. It argues that the President exceeds his constitutional authority when he uses presidential directives to set policy and make laws, a responsibility that the Constitution expressly grants to Congress. In reaching this conclusion, this article first looks at the intent of the Founding Fathers and the history of presidential directives. It then evaluates recent trends in the use of presidential directives that stand in contradiction to the intent of the Framers. It also briefly considers uses of presidential directives by President Bush occasioned by the “war” on terror. It analyzes the limited case law on the subject and discusses recent aborted attempts by Congress and individuals to curb presidential lawmaking by executive order or other directive. Finally, it makes recommendations to the present incumbent, particularly in light of a possibly extended period of “war.”

Jamison E. Colburn, Toward an Architecture of Administrative Adaptation, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=303379. Traditional administrative law sees its core, the Administrative Procedure Act, from only one very confining point of view: as an appliance of judicial “checking” of bureaucratic power pursuant to a neotraditionalist adaptation of the separation of powers. The political history of the Act and, indeed, the separation of powers tradition as a whole, suggest this is a radically incomplete understanding of the whole Act within the eclectic separation of powers. The historical development of the two constitutional values safeguarded in the constitutional doctrine of the tripartite separation of powers is the suspicion of government power as institutionalized in the constitutional doctrine of the tripartite separation of powers. The first involves the suspicion of government power as institutionalized in the constitutional doctrine of the tripartite separation of powers. The second constitutional value safeguarded through the judicial review concerns the protection of personal autonomy through individual rights. Based upon the historical development of American administrative law, the article recalls that judicial review, which checks the power of unelected bureaucrats, remains critical for maintaining the suspicion of government power and protecting individual autonomy in the regulatory state. The article traces the development of the two constitutional values of autonomy and suspicion through three historical periods: (1) the origins of judicial review as...
Regulation, Industry: A Case Study on the Competitive Package Delivery Industry for Reasons of Historical Accident, 26 Harv. Envtl. L. Rev. 33 (2002). While regulatory agencies have been engaging in negotiation with regulated parties and other stakeholders for decades, careful study of the implications of such negotiations has lagged. In particular, while several commentators have now staked out intellectual ground on the theoretical ramifications of regulatory negotiation, empirical analyses of regulatory negotiations have been lacking. This article analyzes the implications of regulatory "reinvention" as the latest in a series of administrative initiatives aimed at achieving better rulemaking and adjudication through negotiations. Reinvention is commonly understood to mean those programs that utilize negotiated agreements to implement regulatory requirements imposed by various environmental statutes. Controversy has visited reinvention, as several specific reinvention projects have raised questions regarding the legality of this administrative practice. Using an economic game-theoretic model, this article argues for a continuation of this practice, but under new statutory authorizations. Reinvention accomplishes much-needed flexibility in environmental statutes that have suffered from partisan Congressional gridlock, and by and large effectuate minor common sense amendments. Several instances of administrative failures, however, have jeopardized the legitimacy of this practice. Statutory authorizations, coupled with funding for enforcement and specific guidelines limiting agency discretion can bring legitimacy to regulatory negotiation. In addition, objective means of monitoring and evaluating the effectiveness of agencies in conducting negotiations are necessary. Towards this end, this article argues for empowerment of citizen groups and presents an empirical means of evaluating the fairness of regulatory negotiations.

Richard J. Pierce, The Appropriate Role of Costs in Environmental Regulation, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=3 01479. In Whitman v. American Trucking Association, 121 S. Ct. 903 (2001), the Court held that EPA cannot consider costs in any way in setting air quality standards. The Court's opinion raises many more questions than it answers. This article discusses three of those questions: (1) which of three commercial and governmental modes of governance in the European Union that (a) include private actors in policy formulation, and/or (b) while being based on public actors, (c) are only marginally based on legislation (these are hierarchical insofar as they are subject to a majority decision) or that are not based on legislation at all. In recent years non-legislative modes of policy-making and modes of governance including private actors in policy-formulation have gained in salience in European policy-making, and they have been advocated as a panacea for speeding up European decision making, which has so often ended up in gridlocks. The European integration project has reached a stage where core areas of the welfare state such as employment policy, social policy, and education are directly affected. These are areas where member state political support is very difficult to gain. Hence a method of cooperation has been developed to avoid the classical form of legislation through directives and regulations; instead, it relies on the open method of coordination, that is, target development and published scoreboards of national performance, as measured by the policy objectives that have been agreed upon, as well as voluntary accords, that is, the self-regulation of private actors.

Shi-ling Hsu, A Game Theoretic Approach to Regulatory Negotiation: A Framework for Empirical Analysis, 26 Harv. Envtl. L. Rev. 33 (2002). While regulatory agencies have been engaging in negotiation with regulated parties and other stakeholders for decades, careful study of the implications of such negotiations has lagged. In particular, while several commentators have now staked out intellectual ground on the theoretical ramifications of regulatory negotiation, empirical analyses of regulatory negotiations have been lacking. This article analyzes the implications of regulatory "reinvention" as the latest in a series of administrative initiatives aimed at achieving better rulemaking and adjudication through negotiations. Reinvention is commonly understood to mean those programs that utilize negotiated agreements to implement regulatory requirements imposed by various environmental statutes. Controversy has visited reinvention, as several specific reinvention projects have raised questions regarding the legality of this administrative practice. Using an economic game-theoretic model, this article argues for a continuation of this practice, but under new statutory authorizations. Reinvention accomplishes much-needed flexibility in environmental statutes that have suffered from partisan Congressional gridlock, and by and large effectuate minor common sense amendments. Several instances of administrative failures, however, have jeopardized the legitimacy of this practice. Statutory authorizations, coupled with funding for enforcement and specific guidelines limiting agency discretion can bring legitimacy to regulatory negotiation. In addition, objective means of monitoring and evaluating the effectiveness of agencies in conducting negotiations are necessary. Towards this end, this article argues for empowerment of citizen groups and presents an empirical means of evaluating the fairness of regulatory negotiations.

Adrienne Heritier, New Modes of Governance in Europe: Policy-Making without Legislating?, Available from the SSRN Electronic Paper Collection: http://papers.ssrn.com/paper.taf?abstract_id=2 99431. The focus of this analysis is on new modes of governance and government in the European Union that (a) include private actors in policy formulation, and/or (b) while being based on public actors, (c) are only marginally based on legislation (these are hierarchical insofar as they are subject to a majority decision) or that are not based on legislation at all. In recent years non-legislative modes of policy-making and modes of governance including private actors in policy-formulation have gained in salience in European policy-making, and they have been advocated as a panacea for speeding up European decision making, which has so often ended up in gridlocks. The European integration project has reached a stage where core areas of the welfare state such as employment policy, social policy, and education are directly affected. These are areas where member state political support is very difficult to gain. Hence a method of cooperation has been developed to avoid the classical form of legislation through directives and regulations; instead, it relies on the open method of coordination, that is, target development and published scoreboards of national performance, as measured by the policy objectives that have been agreed upon, as well as voluntary accords, that is, the self-regulation of private actors.

Rafael Gely, A Tale of Three Statutes . . . (and One Industry): A Case Study on the Competitive Effects of Regulation, 80 Or. L. Rev. 947 (2001). The express package delivery industry for reasons of historical accident is subject to three different federal labor laws: The United States Postal Service is subject to the Postal Reorganization Act, the United Parcel Service and others are subject to the National Labor Relations Act, and Federal Express and some others are subject to the Railway Labor Act. Because regulatory statutes affect market participants' activity, this situation provides a unique opportunity to observe whether these three regulatory regimes impose differential costs upon the firms, potentially skewing market competition. Professor Gely's article analyzes the cost implications of these three labor laws to assess the economic effects of regulation.

Continued on page 26
Biting The Data Quality Bullet
continued from page 2

"objectivity" under the 515 criteria. If the agency declines to alter the model and is sued, Greenwood expects courts to allow suits where the error is not simply a mathematical measurement, but is a "characterization" such as "Acme is the worst polluter in Maine." Greenwood foresees much more frequent centralization of the adverse "characterization" decisions and more staff requests for agency counsel assistance before technical reports on controversial issues are disseminated. Agencies must now do what the private sector has routinely done with consumer research -- the agency must consider how a set of data will be utilized once placed on the agency's website or published in a report. The data's use may increase likelihood of 515 challenges.

Dr. Gary Bass of OMB Watch saw "common sense turned amuck" and cautioned that 515 could be misused in the rulemaking process by opponents of the substance of an agency rule. His group is less concerned about routine error correction than about the use of disruptive tactics of judicial review outside of normal review of a final agency regulation. The OMB guidance to agencies cited the Safe Drinking Water Act risk assessment norms and said agencies could "adopt or adapt" them; most agencies will "adapt" to give themselves more flexibility. Bass believes that judicial review of denial of an administrative appeal should not be routinely available except as part of the overall review of a rulemaking.

Bass offered specific critiques of the guidance issued to agencies by OIRA: Section 515 had focused on data dissemination, but OIRA's guidance expanded its mechanisms to data use and not just to dissemination. The guidance urged agencies to use the Safe Drinking Water Act risk assessment norms that are unacceptable to OMB Watch; the group believes agencies like OSHA should use the best evidence that is available. OMB Watch is concerned that the analysis of scientific data will be done in an arbitrary manner. OIRA called for peer review, but there are undisclosed conflicts of interest in many agency peer review programs. Data quality is only one factor in decision making; health and safety decisions should be aided by precautionary principles. And more attention to public involvement is needed; OMB should have told agencies to err on the side of disclosure where any doubt exists.

Once the data is disseminated, what remedies exist for damages caused? The petition route for correction is less helpful when a false or misleading dissemination damages the affected private person. Senior Judge Loren Smith of the Court of Federal Claims reviewed the jurisprudence of his court and explained how rare the remedial opportunities have been. Congressional private bills referred to his court are the rare exception; most remedies fail under the Federal Tort Claims Act's intentional tort exclusion or the Tucker Act's requirements.

Agency regulations and guidance will appear in the Federal Register this summer. Jim Tozzi invited attendees to keep track of agency proposals at www.thecre.com. The Section Council will be working with the Government Information & Privacy Committee to make appropriate comments in response to the agency proposals.

Council Capsules continued from page 5

"produce consensus on Federal policy issues through collaborative processes open to key stakeholders."

After some discussion, Chair Gray asked council member Cooney to draft a letter to the Dispute Resolution Section outlining the Section's concerns and declining the request to co-sponsor. Those concerns include a lack of evidence that such an organization is needed at the federal level, an absence of provision for council members' disclosure of conflicts of interest, and erosion of the public/private distinction.

Multijurisdictional Practice – Part II

As reported in the previous installment of Council Capsules, the council approved sending a letter to the Commission on Multijurisdictional Practice that would communicate the Section's concern with regard to two of the safe harbors (provisions permitting the practice of law in a non-licensing jurisdiction) proposed in the Commission's interim report dated November 30, 2001. (See Council Capsules, Multijurisdictional Practice, ADMINISTRATIVE & REGULATORY LAW NEWS, Vol. 27, No. 3, Spring 2002).

Proposed Model Rule 5.5(c)(5), which would have allowed transactional representation, counseling and other non-litigation work in a non-licensing jurisdiction on a temporary basis, and proposed Model Rule 5.5(c)(6), which would have allowed lawyers to provide temporary services in a non-licensing jurisdiction involving primarily federal law, international law, the law of a foreign nation or the law of the lawyer's home state, were perceived by some in the Section to not adequately address the needs of telecommunications and energy practitioners, whose practices transcend state lines and involve transactions that are subject to both federal and multi-state jurisdiction, involve ongoing negotiations, and are not dominated by federal law or

Administrative and Regulatory Law News 20 Volume 27, Number 4
the law of any one state.

It appears the Commission has taken heed. As proposed in the Commission’s interim report, Model Rule 5.5(c)(5) permitted the performance of services in a non-licensing jurisdiction on a temporary basis “for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice” or where the services “arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is admitted to practice.” Proposed Model Rule 5.5(c)(6) permitted the performance of services in a non-licensing jurisdiction on a temporary basis to the extent such services “are governed primarily by federal law, international law, the law of a foreign nation, or the law of a jurisdiction in which the lawyer is admitted to practice.”

The Commission’s final report reduces and combines proposed Model Rules 5.5(c)(5) & (6) into proposed Model Rule 5.5(c)(4), which permits the performance of services in a non-licensing jurisdiction on a temporary basis to the extent such services “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” Omitted are the client location restriction, the “substantial connection” requirement, and the primary law restriction.

The final report explains that “this provision would respect preexisting and ongoing client-lawyer relationships by permitting a client to retain a lawyer to work on multiple related matters, including some having no connection to the jurisdiction in which the lawyer is licensed.” Final Report at 25 (emphasis added). The final report further explains that “this provision would authorize legal services to be provided on a temporary basis outside the lawyer’s home state by a lawyer who, through the course of regular practice in the lawyer’s home state, has developed a recognized expertise in a body of law that is applicable to the client’s particular matter.” Final Report at 25 (emphasis added).

The final report states that this provision “is drawn from § 3(3) of the Restatement (Third) of the Law Governing Lawyers” and cautions that to be covered by it, “the lawyer’s contact with any particular host state would have to be temporary.” Final Report at 25, 26. The report does not offer guidance on what is considered temporary and what is not. Indeed, it explains that “the line between the ‘temporary’ practice of law and the ‘regular’ or ‘established’ practice of law is not a bright one.” Final Report at 26. The report anticipates that “the line can become clearer over time as Rule 5.5 is interpreted by courts, disciplinary authorities, committees of the bar, and other relevant authorities.” Final Report at 26.

The Commission’s final report may be viewed at http://www.abanet.org/cpr/mjp-home.html.

---

**Amicus Opposition**

Former Section chair Ron Levin and council member John Duffy briefed the council on the Section’s successful opposition to the Intellectual Property (IP) Section’s proposal to file an amicus brief in *Eldred v. Ashcroft.* The IP Section had proposed that the Board of Governors approve filing a brief that would have supported the constitutionality of the 1998 Copyright Term Extension Act, which extended the copyright of existing works. Levin reported that the Board declined the IP Section’s request, in part because of our Section’s opposition. Duffy commented that the rationale behind the IP Section’s position was unsound from a policy perspective.

**Remarks by ABA President Candidate to Council**


Grey congratulated the Section on owning the longest streak of putting resolutions before the House of Delegates and commended the Section for fulfilling its core mission – aiding professional development. Grey’s other remarks touched on the ABA’s public image, future trends in the practice of law, billable hours, and federal judicial vacancies.

Grey believes the ABA must improve its image. One important aspect of the solution is to promote the work of the sections, which is to meet the professional development needs of its members. He said the ABA has matured over the last ten years by focusing on issues germane to the profession and moving away from commenting on social issues of less professional relevance. He said this maturation has helped the ABA avoid the precipitous decline in membership that other professional organizations have experienced in the recent past.

Grey predicts that the nature of the practice of law will change in the foreseeable future. He sees stability at the top of the profession in the form of large firms aided by globalization but anticipates that the trend toward self-lawyering at the other end of the spectrum will present new challenges. “At some point they will need our assistance, and we need to be ready,” said Grey.

Grey waded into the billable-hours controversy by first noting the increasing proliferation of flat-fee and sliding-scale arrangements. “Clients have demanded it,” he said. But he doubted the practice of tracking associate hours would disappear. He said law firms will “still keep track of time for internal management.”

Grey sees improving ABA executive and legislative access as a key component in the search for solutions to the growing backlog of federal judicial vacancies. He observed that “other interest groups are succeed-
ing” where the ABA is not. He closed by predicting a “renewed emphasis in the coming term on improving the ABA’s relationship with the administration and Congress. The effort will probably not satisfy everybody, but it is a high priority.”

Riding the Circuit
ABA Executive Director Robert Stein dropped in on the council’s Sunday session to say a few words about issues of current concern to the ABA. Stein noted that he tries to attend four to five section meetings each year and recalled meeting with the Admin Law Section about five years ago.

He commended the Section for tackling issues affecting the entire ABA, not just Section members. He said that this was very helpful and had been noticed by the ABA leadership.

Calling this period in ABA history the “good old days,” Stein said ABA membership had reached 408,865, making it the largest professional organization in the world, about with about 100,000 more members than the next largest. Further, he said ABA membership was trending upward, whereas the trend for other professional organizations was downward.

The ABA is having a good year financially, according to Stein. Investment income is off, but dues income is over the budgeted amount, and income from credit card sponsorships has become very lucrative. In addition, the Board has ordered a reduction in expenses. The spate of no dues increases for the past few years should continue a while longer, he said.

Stein also talked about a publicity program the ABA is embarking on this summer that will use a public relations firm to craft ads expressing the ABA’s values. The first ads should be out in early July. The ads will be balanced so that people see them as a debate.

Stein discussed the “Dialogue on Freedom” program initiated by Justice Kennedy and encouraged Section members to visit the ABA web site for materials that could be used to make presentations at high schools on the values of freedom that the war on terrorism is defending.

In a question and answer session, some council members expressed concern that the use of public relations tools will make the ABA look like a special interest group and that the ABA should spend more time testifying at hearings and less time lobbying congressmen. Stein acknowledged that there was some dissent among the ABA leadership regarding the planned public relations effort, but expressed confidence that the ABA has been effective, if not as focused as it might be, in its relations with Congress.

On the topic of billable hours, Stein said “we need to get off the billable hour treadmill.” He believes clients want billings to reflect the value of the services they receive, not the number of hours some associate or partner spends researching an issue. He also believes that over-reliance on billable hours has caused a reduction in mentoring and pro bono service and has contributed to law firm instability. Stein said the Hirschon Commission should be providing some leadership on this issue in the near future.

The Future of Electronic Rulemaking continued from page 7

3. How to deal with e-mail attachments with their attendant risk of viruses, and of overloading systems? What about the ease with which commenters can “dump” huge files or links within their electronic comments? What should the agency’s responsibility be to sift through everything that is “sent over the transom”?

4. What rules should pertain to archiving of chats? To be consistent with the above informational goals, this should be done, but how much flexibility should there be, opportunity for correction, disclaimers, etc.?

5. What about electronic “negotiated rulemaking”? Would this just become a more formalized, more highly moderated, version of “regular” electronic rulemaking? Or would it add value by liberating negotiated rulemaking from the up-front cost concerns (of convening meetings) that seem to be holding it back now.

Other issues:
- Should the Administrative Procedure Act be amended to reflect the electronic age, just as the Freedom of Information Act was in 1996?
- How much uniformity in e-rulemaking should be sought across the government? Or is a best practices approach preferable?
- Do we need a government-wide regulatory thesaurus to be used in agency websites?
- What about the usefulness of electronic meetings/hearings outside rulemaking context? Are there Federal Advisory Committee Act or Government in the Sunshine Act concerns?
- Is there any reason for different approaches in electronic rulemaking between executive and independent agencies?

And, finally, one last issue to consider. We’ve obviously made great strides in the area of agency e-rulemaking, but what if anything have we done in the area
Administrative and Regulatory Law News

of e-adjudication by agencies? Many agencies, such as the National Labor Relations Board, Merit Systems Protection Board, and the Patent and Trademark Office, still develop significant policies through case-by-case adjudication (sometimes with oral arguments and significant participation by intervenors or amici curiae), but there is very little government-wide focus on the informational and participatory goals of such proceedings.

I realize it is a lot easier to raise issues and questions than to solve them. I applaud the Kennedy School and the National Science Foundation for encouraging this dialogue. If my former agency, the Administrative Conference of the United States, still existed, I would hope we would be commissioning the best research minds in the country to help solve these questions, because the vision of a seamless informational and participatory rulemaking process is not only an attractive one, but it has now become an attainable one.

Supreme Court News continued from page 9

time period for the inability to engage in substantial gainful activity. The question then was whether the agency's requirement was permissible. Elsewhere the statute requires that the impairment be "of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy". The degree of severity required is ambiguous, the Court found, and the agency by regulation could establish a reasonable time period during which the person could not engage in substantial gainful work as part of the delimitation of severity. The period of 12 months, the minimum period required by the statute for suffering the impairment, was a reasonable minimum period for the person to be unable to engage in substantial gainful work.

Walton argued that the Court should not afford the agency Chevron deference here, because the agency regulation was only recently adopted, perhaps in response to the litigation, but the Court dismissed this argument, noting that just such an argument against Chevron deference had been considered and rejected in Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735 (1996).

If Justice Breyer had stopped here, his opinion would have been unanimous, but he went on. He noted that the agency had long interpreted the statute in this manner, citing documents back to 1957, and cited a pre-Chevron case for the proposition that the Court accords "particular deference to an agency interpretation of 'longstanding' duration." The fact that these earlier interpretations had not been made in the context of regulations, but in a "ruling," in an enforcement manual, and in a letter, the Court said, "does not automatically deprive that interpretation of the judicial deference otherwise due." As a descriptive statement regarding deference owed to longstanding interpretations because they are longstanding, this would be consistent with pre-Chevron understandings and even with a conception that there may be different bases for strong deference besides the Chevron doctrine. As a statement describing Chevron deference, however, it seems inconsistent with the Court's recent decision in Christensen v. Harris County, 529 U.S. 576 (2000), which denied Chevron deference to an agency opinion letter and in which the Court said:

Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference.

The Court, nevertheless, denied any conflict with Christensen, noting that if the mere absence of notice-and-comment rulemaking deprived an interpretation of Chevron deference, then the extensive discussion in United States v. Mead Corp., 533 U.S. 218 (2001), last term, finally concluding that only Skidmore deference was due to the informal interpretation there, would have been unnecessary. The Court characterized the Christensen analysis as relying "in significant part upon the interpretive method used and the nature of the question at issue." Here, the Court stated, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the 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 all indicate that Chevron provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.

Justice Scalia concurred in the judgment and in the opinion except as to the discussion of the relevance of the agency's longstanding interpretation and why, if the earlier opinions were relevant, they qualified for Chevron deference under Mead. Justice Scalia rightfully states that Chevron did not rely at all on the longstanding nature of the agency interpretation and instead explicitly approved deference to new, changed interpretations, if the statute was ambiguous and the new interpretation was reasonable. He ascribed deference to longstanding interpretations as "anachronism—a relic of the pre-Chevron days." Others might say that it survives Chevron at least in circumstances in
which the *Chevron* doctrine itself would not apply, but in either case Justice Scalia's objection to its use to justify invoking the *Chevron* doctrine seems well taken.

There was, however, a second issue in the case. Walton argued in the alternative that, even if the 12-month period requirement could be applied to the period of inability to work as well as the period of physical or mental impairment, the statute only requires that it "can be expected to last" for that period. In his case, although he was able to return to gainful work after eleven months, this result was unexpected, and at the time he applied for the benefits his inability to work would have been expected to last at least 12 months. Again, however, the agency regulation clearly interpreted the statutory language to preclude this reading, requiring a full 12 months of actual inability to work, if the decision as to eligibility is made more than 12 months after the onset of the inability. Rather than cite *Chevron* and proceeding from there, however, the Court said:

>[the statute's complexity, the vast number of claims it engenders, and the consequent need for agency expertise and administrative experience lead us to read the statute as delegating to the Agency considerable authority to fill in, through interpretation, matters of detail related to its administration [citing to a pre-*Chevron* case].

Then the Court concluded: "The statute's language is ambiguous. And the Agency's interpretation is reasonable."

The Court's perturbations on *Chevron/Mead* may lead some to exclaim as Mark Twain said, and Justice Jackson quoted in his dissent in *SEC v. Chenery Corp. II*, "the more you explain it, the more I don't understand it."

Finally, the author of *Chevron*, Justice Stevens, rendered a decision for a unanimous Court in *SEC v. Zandford*, 122 S.Ct. 1899 (2002), upholding the SEC's interpretation of Section 10(b) of the Securities Exchange Act of 1934 in the context of a particular enforcement action. The Act prohibits fraudulent activity "in connection with the purchase or sale of any security." Zandford, a broker, had been given discretion to trade for a particular account, and he had sold the securities in the account and then used the proceeds for his own use. After Zandford's criminal conviction, the SEC moved for summary judgment in a civil action to enjoin him from future violations and ordering disgorgement of his ill-gotten gains. The district court granted the motion, but the Fourth Circuit reversed, holding that Zandford's action was not "in connection with" the sale of a security; it was simply theft from the customer's account. The Supreme Court reversed. It noted that the SEC "has consistently adopted a broad reading of the phrase 'in connection with the purchase and sale of any security,'" including a 1947 formal adjudication in which the SEC specifically held that a broker who sells a customer's securities with the intent to misappropriate the proceeds violates Section 10(b). "This interpretation of the ambiguous text of § 10(b)," the Court stated, "in the context of formal adjudication, is entitled to deference if it is reasonable [citing *United States v. Mead*]."

Here, the Court found that interpretation reasonable in light of an ongoing scheme by which the broker manipulated the account in various ways in order to liquidate the securities and transfer the proceeds to himself, as opposed to simple embezzlement of the cash proceeds of a customer's account.

**Court Extends Sovereign Immunity/Eleventh Amendment to Agency Adjudications of Private Claims**

In *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S.Ct. 1864 (2002), South Carolina had denied permission to a cruise ship line to dock in Charleston, because the cruise ship was used principally for taking persons outside of South Carolina for the purpose of gambling. The cruise ship line filed a complaint with the Federal Maritime Commission alleging that South Carolina was violating the Shipping Act of 1984 by discriminating against it. Under the Act, persons may file complaints with the Commission seeking reparations and/or administrative cease-and-desist orders against persons who violate the Act. Under the Commission's rules, the complaint was referred to an Administrative Law Judge. The South Carolina State Ports Authority moved for dismissal on the grounds that it was "entitled to Eleventh Amendment immunity" from the action. The ALJ agreed with the State, but the Commission held that sovereign immunity did not bar the action. On appeal, the Fourth Circuit reversed, and the Supreme Court granted certiorari.

Reflecting the 5–4 split that has characterized the Court's Eleventh Amendment cases in recent years, the Court in an opinion by Justice Thomas affirmed the Fourth Circuit, finding that the agency adjudication of the private complaint was the functional and constitutional equivalent of a suit in court which would be barred by the Eleventh Amendment. Justices Stevens and Breyer wrote dissents on behalf of the minority, reiterating their continuing disagreement with the Court's Eleventh Amendment case law but arguing that this case extended that case law and was not compelled by it.

No one doubted that had the Shipping Act provided for a private suit in federal court for violations of that Act, recent Eleventh Amendment case law would have barred such a suit against an unconsenting state. The novel question in the case was whether the same result was required when it was not a suit in a court
but an adjudication before an agency.

The Court began with what has now become familiar ground: "sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." The Eleventh Amendment, rather than defining the extent of sovereign immunity, is merely the articulation of one aspect of that immunity driven by the need to overrule a particular case, *Chisholm v. Georgia*, 2 Dall. 419 (1793). Quoting from *Hans v. Louisiana*, 134 U.S. 1 (1890), the doctrinal foundation for modern Eleventh Amendment law, the Court stated that there is a presumption that the "Constitution was not intended to 'raise' up any proceedings against the States that were 'anomalous and unheard of when the Constitution was adopted.'" The proceedings before the Commission fell under this presumption. The Court noted that formal adjudications before the Commission "bear a remarkably strong resemblance to civil litigation in federal courts." The "preeminent purpose of state sovereign immunity," the Court said, "is to accord States the dignity that is consistent with their status as sovereign entities." Thus, in light of the similarities between civil litigation and the Commission's adjudication, these adjudications would similarly violate the state's sovereign immunity. Indeed, the Court suggested, "allowing a private party to haul a state in front of such an administrative tribunal [might] constitute[] a greater insult to a State's dignity than requiring a State to appear in an Article III court."

The Court dismissed two objections to the application of the sovereign immunity to the case. The government argued that sovereign immunity does not insulate states from actions by the United States, and that although the complaint that initiated the case came from a private person, the action in essence was one by the United States. The Court rejected this argument, noting that under the Shipping Act the private party's complaint to the Commission by itself effectively requires a response from the defendant. The failure to appear itself has legal consequences. Accordingly, it is not the United States that is deciding to bring the action that affects the dignity of the state; it is the private party -- precisely what sovereign immunity is intended to protect against. This the Court distinguished from the more ordinary situation when a person raises a claim to the government, which investigates the claim, and then decides whether or not to bring an action against the violator. This procedure does not raise any sovereign immunity problem.

A second argument by the government was that, even if the requested reparations order would violate state sovereign immunity, a cease-and-desist order would not, because it would not threaten the financial integrity of the state. To this the Court replied that this reflected a fundamental misunderstanding of sovereign immunity; it "applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief." It is not merely a defense to liability; it is immunity from suit.

This latter conclusion may well strike some as odd in light of the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), which created an exception to Eleventh Amendment immunity when the suit seeks an injunction against a state officer to end a continuing violation of federal law. Although there has been some speculation about the continuing vitality of *Ex parte Young*, after rejection of an *Ex parte Young* argument in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the case that signaled the renascence of sovereign immunity in the Supreme Court, the Court recently relied upon it to defeat an Eleventh Amendment claim. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 122 S.Ct. 1753 (2002). Here, at least for the requested cease-and-desist order, the complaint filed by the cruise ship line would seem analogous to situations in which *Ex parte Young* has applied. The Court, however, did not cite or mention *Ex parte Young*.

The effect Federal Maritime Commission will have on agency practices is unclear. Although the case involved an attempt to bring a state into a formal adjudication, and the Court to a certain extent relied on the particular procedural requirements of formal adjudication to show the equivalence to a civil action in court, it seems clear that its holding would equally apply to an informal adjudication, if it too involved a private person in effect requiring the state to appear in the proceeding. At the same time, the Court took pains to distinguish the ordinary situation when an agency begins a proceeding against a state based on the agency's independent determination to bring the case, even if the original information and request came from a private person, going so far as to note that the Commission could still proceed on its own against the South Carolina State Ports Authority. The United States conceded that the Court's decision would not interfere with the Commission's ability to enforce the Shipping Act. Justice Breyer in dissent, however, suggested a more dire consequence. He cited the whistleblower provisions in a number of federal environmental statutes, all of which provide for discharged employees to file a complaint with a federal agency, which then "cause[s] such investigation to be made as [deemed] appropriate," including a "public hearing" conducted pursuant to the formal adjudication provisions of the APA, concluding with findings of fact, which if they support a finding of a violation, results in an order to the offender. In other words, these provisions, at least, seem identical to those in *Federal Maritime Commission*.

At the ABA Annual Meeting in Washington, D.C., the Section will sponsor a panel on this case.
Industries, but U.S. West removed the case to federal district court. The statute provides for removal of cases pending before a "state court." The Ninth Circuit in *Oregon Bureau of Labor and Industries v. U.S. West Communications, Inc.*, 288 F.3d 414 (9th Cir. 2002), held that the case could not be removed to federal court, because BOLI is a state agency, not a state court. The court rejected use of a "functional test" used by the First and Seventh Circuits, but also rejected by the Third Circuit. Because the language of the statute was clear, there was no authority to use a functional test, the court said.

**Recent Articles of Interest**

A competing canons of constructions should courts use when they interpret ambiguous provisions in regulatory statutes; (2) how can an agency make and defend its line-drawing decisions when it is prohibited from considering costs in any way; and, (3) how can courts review an agency's decisions when the agency is prohibited from considering costs.

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

**Collections**


### Officers, Council and Committee Chairs

<table>
<thead>
<tr>
<th>Chair C. Boyden Gray</th>
<th>Washington, DC 202/663-6056</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chair Elect Neil R. Einer</td>
<td>Washington, DC 202/366-4723</td>
</tr>
<tr>
<td>Vice Chair Thomas D. Morgan</td>
<td>Washington, DC 202/994-9020</td>
</tr>
<tr>
<td>Secretary Cynthia A. Drew</td>
<td>Washington, DC 202/616-7554</td>
</tr>
<tr>
<td>Assistant Secretary Jonathan J. Rusch</td>
<td>Washington, DC 202/514-0631</td>
</tr>
<tr>
<td>Assistant Secretary Daniel Cohen</td>
<td>Washington, DC 202/482-4144</td>
</tr>
<tr>
<td>Section Delegates Ernest Gelbhorn</td>
<td>Washington, DC 202/319-7104</td>
</tr>
<tr>
<td>Immediate Past Chair Ronald A. Cass</td>
<td>Boston, MA 617/353-3112</td>
</tr>
<tr>
<td>Budget Officer David W. Roderer</td>
<td>Washington, DC 202/974-1012</td>
</tr>
<tr>
<td>Asst Budget Officer Daniel Cohen</td>
<td>Washington, DC 202/482-4144</td>
</tr>
</tbody>
</table>
Cynthia Drew has left the Department of Justice to take a position as Associate Professor of Law at the University of Miami in Coral Gables, Florida.

Susan Braden has been nominated by President Bush for appointment to the United States Court of Federal Claims.

At the urging of Senate Energy Committee Chairman Jeff Bingaman (D-N.M.), Senator Daschle sent a letter to President Bush requesting the nomination of Suedeen Kelly, the former chairwoman of the New Mexico Public Utilities Commission. Kelly would theoretically fill a seat left vacant by former FERC Chairman Curt Hebert last summer.

Hannah S. Sistare, former staff director and counsel for Senator Fred Thompson (R-TN) on the Senate

Governmental Affairs Committee, has joined the Brookings Institution as the executive director of the newly convened second National Commission on the Public Service. Sistare will direct the Commission's efforts to focus attention on the need for comprehensive reform in the federal public service.

Renee Landers has accepted an appointment as an Associate Professor at Suffolk University Law School, where she will be teaching administrative law and health care law.

Professor Peter Strauss's book, An Introduction of Administrative Justice in the United States (2d ed.) has been published by Carolina Academic Press.

Professor Jim Rossi has left Florida State Law School for the University of North Carolina Law School. 

News that you would like shared with the Section should be sent to William S. Morrow, Jr. at wsmac@royals.com. Items should be received not later than August 16, 2002.