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Harold Leventhal Talk: Thirty Years of Administrative Law in the D.C. Circuit

Thirty Years of Administrative Law in the D.C. Circuit
By Patricia M. Wald

I have been thinking long and hard about how to make a speech on administrative law that won't have you running for the nearest exit.[1] I believe it was Justice Scalia—himself an administrative law buff premier—who said, "Administrative law is not for sissies," and I agree. So buckle your seat belts, and away we will go for a whirlwind tour of three decades of ad law in the D.C. Circuit, where most of it was birthed and continues its turbulent adolescence.

Probably the first question to ask is, Why do we care about administrative law? The quickest answer is that in a big, complex bureaucratic nation like ours, all law (including even criminal law) eventually involves administrative decisionmaking, and virtually all rights eventually have to be secured in whole or in part through the administrative process. The devil, they say, is in the details, and so is administrative law. More and more, inundated courts are confined to reviewing what some governmental agency or commission has already done, rather than making law up in the first place, as our common law predecessors did, or even interpreting legislation as an original matter, which courts used to do much more in the old days than they do now. Almost 60% of the D.C. Circuit's caseload is made up of agency appeals (we are responsible for 37% of all federal agency appeals in the country).[2] But it is not just a numbers game; virtually every critical government decision that affects our lives-the air we breathe, the water we drink, the bills for our latest hospital stay, the health or safety of our workplaces, the parklands we recreate in, the price of gas-comes out of the administrative process. In the past few years, for instance, the D.C. Circuit has reviewed administrative decisions barring servicemen from trying to correct their dishonorable discharges,[3] setting the ground rules for proficiency training for lab technicians processing PAP smears,[4] listing landfills as Superfund clean-up sites;[5] we rejected an NLRB bar on American unions seeking the support of Japanese unions in refusing to handle nonunion cargo,[6] and we overturned the President's attempt by Executive Order to bar the use of permanent replacements for economic strikers in companies with federal contracts.[7] In former years, the court has nixed a gag rule on abortion advice by doctors at publicly-funded clinics[8] as well as FDA's refusal to police the inefficient use of lethal injections in death penalty cases, all on administrative law grounds.[9]

The Beginnings:

How did this, our administrative law behemoth, become so powerful so fast? On what does it feed? When I clerked in the Second Circuit more than forty years ago, we had a tidy sampler of NLRB cases, an occasional ICC rate proceeding, but not much else on our docket having to do with ad law. The course in administrative law taught at Yale Law School in my time-by Tom Emerson-was optional and not exactly over-subscribed. What has happened since? In a terse sum-up, the New Deal's alphabet agencies in the 1930s gave rise to a demand for some uniform set of agency decisionmaking procedures and judicial review principles, in part to offset repeats of the early 1930s' hostile judicial treatment of agency decisions at the hands of judges schooled in the older tradition that it was the legislature and the courts who declared what the law was-no agency "Mister In Between." In 1946, the Administrative Procedure Act was passed,[10] a bare-boned piece of legislation laying down notice-and-comment requirements for agency rulemaking, some due-process-like requirements for agency adjudication, but perhaps most important, the grounds on which courts should review agency decisions for constitutionality and compliance with the underlying statute, for procedural regularity, to insure factfinding was based on substantial evidence, and-harken, all ye of little faith in what courts can do with their own version of stone soup-to assure that the agency decision was not arbitrary and capricious. Anyone aggrieved by the agency's action could seek review unless precluded by statute or unless the decision had been committed by law to agency discretion. More about that gem later. In the main, courts reviewed agency decisions quite deferentially through the fifties and sixties.

Activism in the Seventies

Fast forward to the sizzling seventies. A literal explosion of consumer and environment-oriented legislation came on the scene: EPA, OSHA, CPSC-a second bowl of alphabet soup. Between 1966 and 1981, Congress enacted 182 new regulatory laws and created 24 new regulatory agencies. Compare those figures with the longer period between 1946 and 1965 when only 58 new laws and 8 new agencies were brought into being.[11] Almost simultaneously, the D.C. Circuit lost its jurisdiction over local court jurisprudence, and the void was immediately filled by congressional designations as the chief or even exclusive forum for review of agency rulemakings under the new regulatory laws. D.C. Circuit regulars, like Judges Bazelon, Wright, Robinson, Leventhal, McGowan, Tamm, Robb, Wilkey and MacKinnon, took to the new jurisdiction like flies to honey. They leaped to the challenge of remaking the rules for judicial review to fit the new aggressive regulation as well as the new plaintiffs that were appearing before them-groups like NRDC, EPA, Sierra Club, the Consumer Federation of America and their counterparts in other regulatory areas, eagerly engaged in bringing suits on behalf of the intended beneficiaries of the new laws, rather than the regulated entities who were the traditional appellants in ad law, proceeding under the new "citizen suit" programs Congress enacted that allowed challenges to an agency's failure to implement or enforce the law as well as challenges to what it actually did. Judges Leventhal and Bazelon conducted the de-bate of the decade on whether reviewing courts should be content to concentrate on making sure that the administrative procedures were fulsome enough to guarantee truth-finding (Judge Bazelon's view) or whether (Judge Leventhal's view) they should wade in and confront the arcane and sometimes exotic expertise of agency bureaucrats to guarantee they had indeed engaged in reasoned decisionmaking, not political trading, institutional bias, or private preferences. By the time the Supreme Court vetoed Judge Bazelon's procedural approach in *Vermont Yankee Nuclear Power Corp. v. NRDC*,[12] which would have allowed courts to impose cross-examination and additional procedural requirements beyond those in the

APA, the courts already had a firm foothold in agency processes. Judge Leventhal himself was the principal author of "hybrid rulemaking," that is, requirements that an agency must give notice in its Statement of Basis and Purpose of the data on which it will rely to support any rule and must respond to all significant comments made by interested persons in its explanation of the final rule. He was also the creator of the so-called "hard look" mode of agency review: the courts must assure themselves that the agency has taken a hard look at all concerns the statute deemed relevant; if not, its decision will not qualify as reasoned decisionmaking. The accepted wisdom is that the Supreme Court vindicated his hard look rule in its 1983 Airbags case, *Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co.*[13]

The mood of the country during the seventies and into the early eighties-I realize a lot of you out there were still in Romper Room at the time-was one considerably more tolerant of at least a little judicial activism than nowadays. The courts themselves felt a responsibility to assist in the freeing up of agency regulators from their perceived captured status by those they regulated. The Leventhal notion was that the courts would form a "partnership" with the agencies to help them fulfill democratic legislative initiatives including more forceful regulation, courts instructing agencies, when necessary, how to insure that their decisions met quality standards.[14] The D.C. Circuit led the way in a series of classic administrative law decisions—*Portland Cement*,[15] *Kennecott Copper*,[16] *Calvert Cliffs*[17] —outlining just how a reasoned, reason-able agency goes about making an expert decision combining fact and policy. In most instan-ces, the court's help was appreciated; enthusiastic, mission-oriented agency officials implementing brand new laws welcomed the outside support in their efforts to reform internal agency decisionmaking so as to conform to requirements like looking at all facets and consequences of a decision, organizing a coherent record on which to base a decision, and articulating in the best possible way the reasons why the agency is making its hard choices.

Changes Wrought By *Chevron* and *Chaney*:

Things changed somewhat in the mid-to-late 1980s—a Reagan Administration committed to deregulation stepped forward to bat. Interestingly, even in a deregulatory era, the courts held fast to their pronouncements of the seventies and said that the same procedural and reasoned decisionmaking requirements applied when an agency sought to repeal a regulation as when it adopted one in the first place. But as the courts themselves changed complexion, so to some degree did the national mood in which regulatory review was carried on. The Supreme Court in the late eighties came down with two decisions with enormous implications for administrative law: *Chevron v. NRDC*[18] and *Heckler v. Chaney*[19]; both, incidentally, reversed decisions of the D.C. Circuit. In *Chevron*, the court ordered deference to be given to an agency's interpretation of a statute, unless Congress's intent was altogether unambiguous (previously the notion was that courts construe statutes on their own, giving agency interpretations only the deference they think due in each case) or unless the agency's interpretation was indefensible in view of the purposes and goals of the law. *Chevron* represented a major milestone or millstone (depending on your point of view) in administrative law; roughly 22% of our D.C. Circuit agency reviews involve issues of statutory interpretation,[20] and *Chevron* seemed definitely to cut in the agency's favor in those cases. *Heckler v. Chaney* handed down the pronouncement that judicial review was foreclosed altogether when the statute (or regulations) laid down no firm principles to guide the agency in making the decision under challenge, since without such instructions, the court had no basis for judicial review. Resource-allocation decisions like whether or how vigorously to enforce a law were, the Court said, presumptively committed

to agency discretion by the APA, and unless Congress said otherwise, the courts must cut out. Over a decade later exactly what kinds of decisions come under the *Heckler* immunity from review is still up for grabs, and agencies are still trying to enlarge the scope of that immunity.

Agency "Ossification:"

The Supreme Court averages only a few important administrative law cases a decade, and in between lower courts have the field pretty much to themselves. Academics also have their innings-fads on criticism of judicial review come and go. During the 1980s and early 1990s, the "ossification" school was clearly in session. Too much nit-picking by reviewing courts was resulting in agency paralysis, the academics said; agencies were afraid to issue rules without endless mountains of data and layers of internal or even outside peer review; as a result they kept outdated rules on the books or put their new policies in the form of unreviewable guidance instructions, manuals or policy statements, anything to avoid formal rulemaking, or they spent enormous sums of money on unnecessary research and analysis to justify the rule.[21] In 1971, the EPA's statement of basis and purpose for all its ambient air quality standards took up a single page in the *Federal Register*; 16 years later, in 1987, the review of a single one of those standards consumed 36 pages supplemented by 100 staff papers.[22] Personally, I've never been entirely convinced there was a strong empirical as opposed to anecdotal basis for the "ossifica-tion" critique, but it did gain momentum, and perhaps put some courts a bit on the defensive. Over the years the D.C. Circuit has shown a fairly steady rate of reversal or remand of agency decisions-around 22%.[23] And my own research shows that most of our reversals are due to failure of the agency to give an adequate explanation for its decision, not for lack of substantial evidence to undergird its findings.[24] Nonetheless every few years or so, some massive-five years in the making-agency rulemaking is overturned by the courts, and the "ossification" criticism flares up anew.

In *Shell Oil Company v. EPA*,[25] a few years ago, our court invalidated a complex waste disposal rule which had been in place for ten years for failure to give the requisite adequate notice and comment at its inception-a full decade earlier. That decision put at risk scores of criminal convictions and civil fines for polluters. Even more dramatic, in *AFL-CIO v. OSHA*,[26] the Eleventh Circuit overturned OSHA standards dealing with 21 million workers' exposure to 428 toxic substances. The agency had decided to undertake an "omnibus" or "generic" rulemaking because in its judgment "it would take decades to review currently used chemicals and OSHA would never be able to keep up with the many chemicals which will be newly introduced in the future." In fact, since 1971, OSHA had managed to issue regulations dealing with exposure to only 24 toxic substances. The OSHA chief thought that by treating 428 substances in one regulation, the agency could "make a 20-year leap forward in the level of worker protection in a relatively short time."

This approach proved unreal, however; the appeals court reversed the standards because of the agency's failure to make a separate scientific case for each individual chemical's potential for health risk. While acknowledging that OSHA acted "with the best of intentions" and that this may have been "the only practical way of accomplishing a much needed revision ... and of making major strides towards improving worker health and safety," the court nonetheless concluded the only solution was for the agency to go back to Congress and ask for authorization to paint with a broader brush. The sweep of this decision was awesome: It abolished standards altogether for nearly half the substances covered by the rejected rule

and rolled back the rest to the level of 1970 voluntary standards. According to the Washington Post, "[t]he decision stunned OSHA officials ... raising serious questions about the agency's ability to cope with the future regulation of workplace health hazards."[27]

Similarly, the Fifth Circuit invalidated an EPA rule to prohibit the future manufacture, processing, and distribution of asbestos, wiping out the product of twelve years of agency investigation and rulemaking. The fatal flaws requiring reversal, according to the court, were the agency's failure to give prehearing notice to the public that it was going to rely on "analogous exposure" estimates to calculate the expected benefits of certain product bans and its inadequate consideration of alternatives to a total asbestos ban.[28] In still another recent case, the Ninth Circuit struck down an EPA rule allowing "negligible risk" amounts of cancerous pesticides in 800 processed foods.[29] This rule affected 10% of the pesticides on the market, those that show up in minute amounts in processed tomato paste, raisins, grains, juices, and cottonseed oil. In the rule, the EPA had adopted an estimated one-in-a-million threshold chance of inducing cancer as permissible. The reviewing court, however, said that only Congress could confer that kind of waiver power; the EPA had no discretion to allow "negligible risks" under the thirty-five-year-old Delaney clause that absolutely prohibits adding cancer-causing substances to processed foods but does not apply to fresh foods. Right or wrong, these well-publicized cases send shudders down the bureaucratic spine, and incite critics of judicial review to heights of almost pathological despair.

Those cases are not typical, however. My mini-survey of one year's rulemaking in our circuit showed that of 36 major agency rules that came up for review, the agency's judgment was affirmed wholly in 19 cases, and in the bulk of the other 17, most of the rule was upheld. In four cases, the notice and comment requirement had not been followed; in six cases the agency's explanation for its choices was not deemed adequate; in seven cases the court said it read the statute wrong.[30] A second D.C. Circuit survey of 135 agency cases of all kinds showed substantial evidence challenges were made in only 13%.[31]

In my view, the major obstacle for agencies on review is convincing a court that they have made rational choices and considered all the arguments and evidence. I've said elsewhere-and I repeat it here-a lot of the misfires came down to matters of miscommunication; agencies often simply fail to address an important objection or give no coherent reason at all for a policy determination. Forty-six percent of challenges on appeal are to the arbitrary and capricious nature of the decision; and twice as many remands are for this reason as for any other.[32] Given that judges may have different tolerance threshold levels for incomplete or confusing explanations, after 18 years it is still hard for me to understand why agencies don't "moot court," not their lawyers arguing in court, but their opinion writers, to assure that agency explanations for their decision are comprehensive and comprehensible to generalist judges. Returning cases to the same panel which remanded them to the agency-a practice I have repeatedly espoused but which the D.C. Circuit does not yet practice-would further help to keep the inconsistencies between judges down. Ad law is not a precedent-controlled branch of law-hardly any case is just like a prior one. In the end, it is amassing the evidence and organizing it around key principles which will convince a court the agency has made a reasoned decision. My guess is that Judge Leventhal would not come out so differently than our current court on the ones we throw back.

The Impact of Textualism:

Apart from *Chevron* and *Heckler*, there have been only a relatively few other defining developments in administrative law since the Leventhal days. One is the advent of textualism, a school of statutory interpretation which places almost exclusive reliance on the text of a statute for its meaning and generally eschews legislative history, committee reports, floor debates and hearings as aids to ascertaining congressional intent. The thrust of textualism is Congress says what it means, unless the result is patently absurd, and Congress has to say what it means or we on the courts will not hunt through what one commentator calls "the garbage cans of legislative history" to flesh out its meaning. According to the textualists-Justices Scalia and Thomas are the leading proponents on high, but there is not yet a majority on that Court or ours which adheres strictly to the doctrine-reports and hearings represent only the work of legislative aides and the results of special interest lobbying; most legislators never read them and so they are inaccurate indicators of congressional intent. Congress passes a law, not a report. In the old days, courts in construing statutes would look more often to the purposes of the law, the evils it was designed to counter, its legislative surroundings to decide how best to make it fit its intended function. There is much less of this now. One has only to compare a 1970s' decision like *Portland Cement*, in which Judge Leventhal said:

In ascertaining congressional intent we begin with the language of a statute, but this is subject to an overriding requirement of looking to all sources including purpose and legislative history, to ascertain discernible legislative purpose.[33]

with a more recent D.C. Circuit decision which said:

[W]e look to the general purpose of the statute in interpreting a provision when Congress' intent is not clear from the plain language of the provision.... [T]he agency may not simply disregard the specific scheme Congress has created for the regulation of fuels in order to follow a broad purpose statement.[34]

to sense a qualitative difference in the courts' comfort with looking beyond the immediate text. Now initially one-and I myself was such a one-would have guessed that textualism would add to Chevron deference by telling the courts if the plain words don't give you the answers all by themselves, the agency's interpretation will win. Yet ad law cognoscenti say the opposite has happened, that textualist-minded courts are much more apt to find a clear intent under Chevron I in the words alone, and so never proceed to the deferential Chevron II analysis where the agency can interpret its law in any reasonable way to implement its purposes or goals. One study showed that between 1984 and 1990, the percentage of Chevron-type cases decided in the deferential step 2 went down from 66% to 33%.[35] In short, judicial power reasserts itself in textualism to the detriment of agency power. Be that as it may, I have historically resisted textualism as have many of my judicial brothers and sisters because (1) there is just no way in our world of complex arcane regulatory statutes that Congress can make its precise intent absolutely clear in a few well-chosen words in every instance, so that no ambiguities arise when a regulatory instruction is applied to a myriad of often unforeseeable situations; and (2) if Congress chooses to work through committees, hearings and floor debates, I find it a bit presumptuous for another coordinate branch to repudiate Congress' processes and say we will not even consider such evidence of what they said they were trying to do. But I must concede, though it has not yet been declared the winner, textualism has made

inroads on the decidedly freer reign of former courts to make laws on the books fit the problems in the real world. And insuring a coherent enforcement scheme has got to be more difficult for an agency when each separate statutory provision is looked at by the courts as if it existed in isolated textualist splendor. In sum, I see textualism as a symptom of a subtle shift that has come about in the relationships between agencies, Congress and the courts in the last decade and a half:

The generous faith placed in Congress during the 1960s and 1970s-along with the judicial willingness to fill in statutory gaps that accompanied it-eroded during the 1980s. But now in the 1990s, judicial distrust of former pre-1994 Congresses appears to be on the upswing as courts resist interpreting congressional intent to delegate authority for any purposes not plainly specified in the immediate sections under construction. And Chevron step two-type discretion, which at one time seemed a bottomless reservoir of potential judicial approval, seems to be giving way to stricter limits on the leeway granted agencies in implementing statutes. Even if Congress does not speak in preclusive terms-"thou shalt not" or "only if"- the courts will limit what the agency can do, and on what basis it can act, to the activities and the criteria that Congress does expressly talk about. It seems, indeed, that 1980s skepticism about Congress as the repository of the public interest is now matched by a similar suspicion of executive agencies who are perceived as susceptible to succumbing to the temptation of overextending their authority by construing pro-environmental legislation too broadly. The result: environmental advocates, fighting to preserve past gains in an increasingly anti-regulatory atmosphere. cannot be confident of court confidence in either of the institutional allies they en-joyed through the 1970s and some of the 1980s.[36]

Focus on Standing:

A second major change from Judge Leventhal's era is the rising importance of jurisdictional issues in ad law reviews; refinements in the old-time doctrines of standing, ripeness, finality, and the addition of a newcomer in the form of *Heckler v. Chaney*'s broad interpretation of "committed to agency discretion by law." Since the mid-eighties, both our court and the Supreme Court have been tightening up on who can take appeals from agency decisions and when. It is now not enough that the party trying to appeal have participated in the agency proceedings below; he, she, or it must show all the constitutional and prudential requirements of standing under Article III, as the courts keep adding successive new layers of baggage onto the simple phrase "case or controversy." In the 1970s Judge Leventhal's court was still basking in the loosened-up standing climate of *Associated Data Processing*[37] and SCRAP,[38] which recognized a much broader range of "injuries" than before and had not yet laid down a bed of hot coals for tracing those injuries to the challenged governmental action or a formal requirement that the court itself be able to substantially redress the injury all by itself. In a series of eighties and nineties cases, the Supreme Court and ours have made standing a centerpiece of their jurisprudence. The injury must be concrete, particularized, actual or imminent, directly traceable to the action complained of, and substantially redressable by the court; the challenger must be a "peculiarly suitable" one to advance the purposes of the Act to fall within its prudential zone of interests.

A year or so ago, in *Humane Society of the United States v. Babbitt*,[39] we held that no one had standing to challenge the Department of the Interior's certificate permitting the transfer of a rare-breed elephant formerly housed in the Milwaukee Zoo to a commercial showplace as violative of the Endangered Species Act-not the Humane Society or any of its members who regularly visited the elephant in the zoo. The

denial of standing turned in large part on the court's refusal to credit the petitioners' claims of injury; their distress at the elephant's absence was insufficient because "general emotional harm, no matter how deeply felt" is never sufficient for standing, and since other elephants were still at the zoo the absence of this particular elephant caused no concrete injury-in-fact to visitors. More recently, we surpassed even that previous effort. In *Florida Audubon Society v. Bentsen*,[40] we held that in order to have standing so as to force the government to prepare an environmental impact statement (EIS) on the effects of tax subsidies for ethanol, a party must demonstrate:

[A] particularized injury ... fairly traceable to the passage of the tax credit .... For the tax credit to pose a substantial probability of a demonstrably increased risk of particularized environmental damage, the credit must prompt third-party fuel producers to undertake the acquisition of production facilities for ETBE and begin to produce ETBE in such quantities as to increase the demand for ethanol from which ETBE is derived. This increased demand for ethanol must then not simply displace existing markets for currently-produced ethanol, but in fact increase demand for the agricultural products from which ethanol is made. Again, this demand must not be filled by existing corn or sugar supplies, but instead spur new production of these products by farmers, who must be shown to have increased production at least to some measurable extent because of the tax credit, rather than any one of other innumerable farming considerations, including weather, the availability of credit, and existing subsidy programs. Moreover, any agricultural pollution from this increased production must be demonstrably more damaging than the pollution formerly caused by prior agricultural production or other prior use of land now cultivated because of the ETBE tax credit. Finally, the farmers who have increased production (and pollution) as a result of the tax credit must include farmers in the regions visited by appellants, and they must use techniques or chemicals in such fashion and to such extent as to threaten a demonstrably increased risk of environmental harm to the wildlife areas enjoyed by appellants.

As I have said, it would have been more economical, and more direct, to simply insert the heading "Standing: Tax Subsidies" and under it provide a one word analysis—"never."[41]

Especially in environmental cases, courts should remember that at base, the use of our natural resources is a communitarian matter. Why must a genuine dispute over an acknowledged injury to the environment stemming from an alleged violation of law be judgeable only when one individual can show a minutely particularized use of the resource that is threatened, down to the last square inch of hiked soil, or the date of the next planned visit to the zoo? I believe it is truly time to reconceptualize environmental standing. Whether our substantive environmental law changes or remains the same, surely the incorporation into our law of more realistic notions of which affected persons or communities have the right to protest environmental violations is subject to rethinking.

We now have a Talmudic jurisprudence, indecipherable to most, and in some cases contradictory within itself as to who may bring an agency appeal. Is it any wonder that agencies now raise jurisdictional challenges in 51% of the agency appeals brought in our circuit?[43]

A brief word on *Heckler* challenges-the agencies continually try to push the envelope on this one, regardless of which Administration is in power. They have long since moved beyond the enforcement or

resource allocation decisions clearly identified in *Heckler* as legitimately left to the agencies. In one recent case, an elaborate formula for allocating money to Indian tribes to run certain programs was laid down in the law (as a result of past BIA abuses in that regard) but made subject "to the availability of appropriations." The government argued, unsuccessfully, that this boilerplate phrase meant that whenever Congress appropriated any amount less than the total needed to satisfy the formula, all bets were off and the agency could allocate the monies any way it wished, since there was "no law to apply."[44] All in all, 28% of agency appeals fall by way of failure to meet threshold jurisdictional criteria.[45] Buried in that statistic may indeed be a genuine philosophical debate about the values and costs of access to the courts for review of agency decisions.

Things might be looking up a bit, even for a perennial pessimist like myself. In *Bennett v. Spear*,[46] this term, the Supreme Court, which has long led the push for tighter standing requirements, suggested in finding standing under the citizen suit provision of the Endangered Species Act for ranch operators who opposed the government's species-protective activities that it would accept what seems like a somewhat more relaxed framework for deciding when plaintiffs suffered an injury traceable to and redressable by the governmental action being challenged. Let's hope it applies to suits brought by environmentalists as well as their opponents.

The Ad Law/Con Law Connection:

The last change I want to signal from the old Leventhal court is the increasing frequency with which administrative law and constitutional matters cohabit the same case. For years, academics have debated interminably about the separation of powers concerns inherent in review of agency actions, generally, and especially with respect to the intrusiveness of judicial review that threatens to invade the executive domain of policymaking. But the more immediate dilemma we in the courts now face is what to do in construing a law when the *Chevron* formula may lead us to a construction which has serious constitutional problems. It already happens several times a year (I counted 11 in 1995), and I predict it will happen even more often in the future. The rule in our circuit right now is that *Chevron* deference gets trumped by the canon requiring avoidance of unnecessary constitutional determinations, but the Supreme Court's instruction on the subject is not yet clear. Sometimes they follow that rule and sometimes they don't. It is worth remembering that when *Chevron* dictates can be bypassed by the existence of a constitutional problem, judicial discretion and authority replace the agency in the driver's seat.

Given this potentially intrusive effect, courts should exercise restraint in pushing into the constitutional arena head first. The mere fact that an agency is acting in an area with constitutional implications, as the FEC and the FCC commonly do, should not be enough. Rather, the agency's interpretation must raise a concrete and avoidable constitutional question, in order to trump *Chevron* deference. One obstacle to judicial restraint in cases with constitutional issues hovering in the shadows is that agency decisionmakers are not allowed to overturn the statutes they implement or their own regulations on constitutional grounds. This means that agency action will usually come to the reviewing court without any initial decision on the intersection of the Constitution and the applicable statute. Even though agencies cannot decide that the statutes they are implementing are unconstitutional, they should, however, as we have indicated on several occasions, take background constitu-tional issues into account in interpreting and implementing the laws they administer.

This has been a long luncheon journey through three decades of administrative law in the circuit. Ad law is our circuit's bread and butter, and it does involve issues affecting all our lives-and our children's. The APA, still our compass, is steady but not necessarily the most technologically up-to-date model. Much is added, subtracted, lost, and gained by judges over time in interpreting its signals. Judge Leventhal's court began a kind of administrative law revolution in access and intensity of review; his partnership notion of courts and agencies traveling the progress road hand in hand may have been too ambitious, but his hard look review and hybrid rulemaking survive intact today. New politics, new theories of interpretation, a few key Supreme Court decisions have peppered the pot, but in my view the need for demanding judicial review is greater than ever, as administrative agency decisionmaking plows through new fields and applies brand new knowledge to old ones. Our generalist review may at times be frustrating and irritating for agencies, but I surely doubt that it would be in our interests to do away with it, and I am inclined to believe Judge Leventhal would agree with that conclusion.

Notes:

1. Some of the material in this talk has appeared in my earlier publications. *Environmental Postcards From the Edge*, 26 ENVTL. L. REP. 10182 (1996) [hereinafter *Environmental Postcards*]; *Regulation at Risk*, 67 S. CAL. L. REV. 621 (1994) [hereinafter *Regulation*]; and *Judicial Review in Midpassage*, 32 TULSA L.J. 221 (1996) [hereinafter *Judicial Review*].
2. *Judicial Review*, supra note 1, at 232, n.66.
3. *Dickson v. Secretary of Defense*, 68 F3d 1396 [9 *AdL3d 778*] (DC Cir 1995).
4. *Consumer Fed'n of America v. HHS*, 83 F3d 1497 [10 *AdL3d 525*] (DC Cir 1996).
5. *Board of Regents v. EPA*, 86 F3d 1214 [10 *AdL3d 535*] (DC Cir 1996).
6. *Int'l Longshoremen's Ass'n v. NLRB*, 56 F3d 205 (DC Cir 1995).
7. *Chamber of Commerce v. Reich*, 83 F3d 442 (DC Cir 1996).
8. *Nat'l Family Planning and Reproductive Health Assn. v. Sullivan*, 979 F2d 227 [5 *AdL3d 914*] (DC Cir 1992).
9. *Chaney v. Heckler*, 718 F2d 1174 [58 *AdL2d 886*] (DC Cir 1984), rev'd 470 US 821 [61 *AdL2d 327*] (1985).
10. Ch. 324, 60 Stat 237 (1946) (codified as amended in scattered sections of 5 USC).
11. *Judicial Review*, supra note 1, at 225 and citations listed therein
12. 435 US 519 [42 *AdL2d 728*] (1978).
13. 463 US 29 [57 *AdL2d 1*] (1983).
14. Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509 (1974).
15. *Portland Cement Ass'n v. Ruckelhaus*, 486 F2d 375 [33 *AdL2d 819*] (DC Cir 1973).
16. *Kennecott Copper Corp. v. EPA*, 462 F2d 842 [30 *AdL2d 446*] (DC Cir 1972).
17. *Calvert Cliffs Coordinating Comm., Inc. v. Atomic Energy Comm'n.*, 449 F2d 1109 [29 *AdL2d 249*] (DC Cir 1971).
18. 467 US 837 [59 *AdL2d 961*] (1984).
19. 470 US 821 [61 *AdL2d 327*] (1985).
20. *Judicial Review, supra* note 1, at 241.

21. *See, e.g.*, Thomas D. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 1992 DUKE L.J. 1385.
22. *Regulation, supra* note 1, at 625.
23. *Judicial Review, supra* note 1, at 232.
24. *Regulation, supra* note 1, at 637.
25. 950 F2d 741 [4 AdL3d 824] (DC Cir 1991).
26. 965 F2d 962 (11th Cir 1992).
27. Discussed with citations in *Regulation, supra* note 1, at 628.
28. *Corrosion Proof Fittings v. EPA*, 947 F2d 1201 [4 *AdL3d 782*] (5th Cir 1991).
29. *Les v. Reilly*, 968 F2d 985 [5 *AdL3d 333*] (9th Cir 1992).
30. *Regulation, supra note* 1, at 636-38.
31. *Judicial Review, supra* note 1, at n.66.
32. *Judicial Review, supra* note 1, at 234.
33. 486 F2d 375 at 379-80.
34. *Ethyl Corp. v. EPA*, 51 F3d 1053, 1060-61 [8 *AdL3d 1352*] (DC Cir 1995).
35. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, at 981 (1992).
36. *Environmental Postcards*, supra note 1, at 10185.
37. *Associated Data Processing Orgs. v. Camp*, 397 US 150 [26 *AdL2d 427*] (1970).
38. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 US 669 [32 *AdL2d 1103*] (1973).
39. 46 F3d 93 (DC Cir 1995).
40. 94 F3d 658 [10 AdL3d 884] (DC Cir 1996) (*en banc*).
41. *Judicial Review, supra* note 1, at 250.
42. *Environmental Postcards, supra* note 1, at 10186.
43. *Judicial Review, supra* note 1, at 248.
44. *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F3d 1338 [10 *AdL3d 508*] (DC Cir 1996).
45. Judicial Review, supra note 1, at 256.
46. ___ US ___, 117 S Ct 1154 [11 *AdL3d 302*] (1997).