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Evaluating Regulatory Interpretations: Individual Statements

By Russell L. Weaver*

Deference principles have been in existence for nearly two centuries.¹ Those principles seem relatively straightforward. For example, when the meaning of a regulatory provision is in doubt, deference principles require a reviewing court to accept an administrative agency's interpretation and application of its governing statute² and

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¹ The concept of deference was used, initially, as an aid to the interpretation of the Constitution. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 336 (1816); Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803). It since has been used in statutory interpretation, see Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 403-04 (1987) ("It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."); Smythe v. Fiske, 90 U.S. (23 Wall.) 374, 382 (1874) (Treasury Department construction of statute, "though not controlling, is not without weight, and is entitled to respectful consideration."); United States v. Dickson, 40 U.S. (15 Pet.) 157, 160-61 (1841) ("The construction so given by the Treasury Department to any law affecting its arrangements and concerns, is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice."); Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827) (The "construction of those who were called upon to act under the law, and were reappointed to carry its provisions into effect, is entitled to very great respect."), and in the interpretation of executive orders. See, e.g., Union Oil Co. v. Department of Energy, 688 F.2d 797, 807 (Temp. Emer. Ct. App. 1982) (Just as courts defer to an agency's interpretation of a statute or regulations, "[s]imilar deference is shown an agency interpretation of an executive order.") (citation omitted)), cert. denied, 459 U.S. 1202 (1983).

² See, e.g., NLRB v. United Food & Commercial Workers Union, 484 U.S. 112, 123-24 (1987) ("[W]e have accorded the Board deference with regard to its interpretation of the NLRB as long as its interpretation is rational and consistent with the statute."); Clarke, 479 U.S. at 403 ("It is settled that courts should give great weight to any reasonable construction of a regulatory scheme adopted by the agency charged with the enforcement of that statute."); United States v. City of Fulton, 475 U.S. 657, 666-71 (1986) ("The relevant federal agencies, however, . . . have interpreted the statute. . . . We must uphold that interpretation if the statute yields no definitive contrary legislative command and if the agencies' approach is a reasonable one." (citations omitted)).

The most important recent deference decision is Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, reh'g denied, 468 U.S. 1227 (1984). In that case, the United States Supreme Court defined the parameters of deference. The Court stated that a reviewing court should first determine whether Congress specifically addressed the interpretive question at issue. If so, then the court should honor Congress's intent. If Congress has not specifically
regulations. But, the apparent simplicity of deference principles is deceiving. The federal courts apply a variety of deference standards, some of which conflict, and they sometimes supplant those standards with other interpretive rules. As a result, many question whether deference principles are consistently applied.

addressed the issue, then the court should attempt to determine whether the responsible administrative agency had resolved the issue. If so, the court should not decide the interpretive question on its own. Instead, it should defer to the agency's interpretation if it "is based on a permissible construction of the statute." \textit{Id.} at 843.

\textit{Chevron} suggests that the appropriate degree of deference depends on the situation. When Congress explicitly delegates interpretive authority to an agency by leaving a gap in a statutory scheme requiring or permitting an agency to promulgate regulations to fill that gap, there has been an express delegation of authority. In this situation the agency's interpretive decisions (its regulations) are given "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." \textit{Id.} at 844. Even in the absence of an express delegation to promulgate legislative regulations, deference is appropriate provided that the agency's interpretation "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." \textit{Id.} at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).


\textit{5} See \textit{The Deference Rule}, supra note 3, at 590-97.

\textit{6} See id. at 597-600.

\textit{7} See id. at 590-91, 601-02; see also United States v. Swank, 451 U.S. 571, 595 (1981) (The majority in \textit{Swank} rejected an administrative interpretation without any discussion of the deference rule. Justice White, dissenting, observed: "I dissent from the Court's opinion which is nothing more than a substitution of what it deems neat and proper for the wholly reasonable views of the Internal Revenue Service as to the meaning of its own regulation and of the statutory provisions."). Further, in Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 712 (1980), Justice Marshall stated in dissent:

The plurality ignores applicable canons of construction, apparently because it finds their existence inconvenient. . . . Can it honestly be said that the Secretary's interpretation of the Act is "unreasoned" or "unsupported"? . . . .

The plurality's disregard of these principles gives credence to the frequently voiced criticism that they are honored only when the Court finds itself in substantive agreement with the agency action at issue.

Also instructive is Kraus & Bros. v. United States, 327 U.S. 614 (1946), in which a criminal
Recent litigation suggests that the federal courts encounter other, equally serious problems in their attempts to apply deference principles. Some of these problems are fundamental and definitional. For example, courts have had difficulty determining what constitutes an administrative interpretation. Administrative officials make many different types of interpretive statements in a variety of contexts. Some of these statements are clearly authoritative, but

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many are not. As one court observed: "It is in the nature of a complex administrative bureaucracy to issue a variety of reports, releases, opinions, advisory letters, and other similar statements in performing its task." The federal courts have disagreed about which of these statements deserve deference.

Interpretive statements by individual agency employees, especially subordinates, have provided a particular source of conflict. Courts disagree about when such statements may be treated as administrative interpretations, and when they constitute nothing more than the individuals' personal views. As one judge noted,


11 Diaz v. INS, 648 F. Supp. 638, 645 (E.D. Cal. 1986). The court went on to note that "[s]tatements issued range from formal written pronouncements published in the Federal Register through interpretations from top administrators to letters penned by the lowest-level employee." Id. Further, as one commentator noted, interpretation is "an inescapable part of administration." Hans J. Morgenthau, Implied Regulatory Powers in Administrative Law, 28 IOWA L. REV. 575 (1943).

12 Compare Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 784 (D. Del. 1978) ("The plaintiffs cite numerous public statements by FEA personnel endorsing the proportional method and contend that the FEA construed the regulations in effect during the relevant period to permit use of that method. The FEA attempts to dismiss the pronouncements on which the plaintiffs rely as clearly erroneous and merely the unauthorized and unofficial views of several of the agency auditors."); aff'd sub nom. Standard Oil Co. v. Department of Energy, 596 F.2d 1029 (D.C. Cir. 1985) with Pennzoil, 680 F.2d at 171-72 (suggesting that only interpretations that are "institutional in character" deserve deference). Though the court in Pennzoil did not expressly define which agency interpretations are institutional in character, the court in Diaz held that a reviewing court "must give great weight to the pronouncements emanating from an agency's national office which are intended to provide guidance to an agency nationwide, and at least some consideration to other statements." Diaz, 648 F. Supp. at 645. The Diaz court based this ruling on the fact "that the statement by the regional official did not reflect an official position because it was "not approved by [the agency's] General Counsel or by any departmental official in the national office."" Id. (quoting Miller v. Yonakim, 440 U.S. 125, 144-145 n.25).

13 See First South Prod. Credit Ass'n v. Farm Credit Admin., 729 F. Supp. 1559, 1570 (E.D. Va. 1990) ("[A]n agency's interpretation of a statute need not be embodied in a rule or regulation in order to be accorded deference."), rev'd, 926 F.2d 339 (1991); Diaz, 648 F. Supp. at 645 ("The absence of a consistent standard by which to determine whether a statement issued by the agency is an official agency interpretation makes it difficult for a district court to decide when to defer to purported agency opinions voiced by its staff.")(E.D. Cal. 1986).
"Although common sense tells us that the utterance of a lower-echelon agency employee should not be accorded weight equal to the formal interpretation of an agency chief, the case law does not suggest clear standards by which to distinguish the different types of statements." 14

This Article examines recent litigation on the subject of deference, giving particular attention to judicial treatment of interpretive statements by individual agency employees ("individual statements"). It begins by examining judicial disagreements regarding individual statements,15 and suggests some reasons for the disagreement.16 Then, it offers some solutions to these disagreements,17 and some insight into the proper uses of individual statements.18

I. EVALUATIVE DIFFICULTIES

"Individual statements" present special problems for the courts. Deference principles assume that the responsible administrative agency has authoritatively interpreted a regulatory provision.19 Faced with such an interpretation, deference principles require a court to defer. In many instances, agencies do make authoritative pronouncements.20 For example, they state their interpretations in the form of substantive regulations,21 final adjudicative decisions,22 interpretive bulletins or policy statements issued to the public,23 or

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14 Diaz, 648 F. Supp. at 645; see also Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988) ("Although the Court deems a memorandum from a former official of an agency charged with administration of a statute to be persuasive authority, such a memorandum cannot be held an official pronouncement by the agency of the meaning of that statute.").

15 See infra part I.
16 See infra part II.
17 See infra part III.
18 See infra part IV.
19 See Inter-Agency Conflicts, supra note 8.
20 See cases cited supra note 10.
23 See Miller v. Youakim, 440 U.S. 125, 144-45 n.25 (1979) (addressing HEW statutory interpretations issued through official pronouncement called "Program Instructions"); Diaz v. INS, 648 F. Supp. 638, 645 (E.D. Cal. 1986) (noting that agency policy statements may take many forms ranging "from formal written pronouncements published in the Federal Register through interpretations from top administrators to letters penned by the lowest-level employee"); cases cited supra note 10.
instructional manuals designed to inform lower-level employees of the meaning and application of regulatory provisions.24

However, many interpretive statements are not issued by agencies in their own names.25 In many administrative agencies, especially in large ones, it is physically impossible for the agency head to be involved actively in the day-to-day administration of every regulatory program.26 Often, the agency head delegates authority to subordinates and becomes involved only when difficult or politically sensitive issues arise. As a result, subordinates are forced to make interpretive decisions. They state these decisions in a variety of contexts: congressional hearings,27 affidavits submitted in litigation,28 and legal briefs.29 In addition, they informally advise

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24 See, e.g., Keyes v. Secretary of the Navy, 853 F.2d 1016, 1020-21 (1st Cir. 1988) (stating that it is the Office of Personnel Management’s (OPM) duty to “insure through the FPM [Federal Personnel Manual], ‘personnel instructions, operational guidance, policy statements, related material on government wide personnel programs, and advice on good practice in personnel management to other agencies’” (citing FPM, ch. 171, sub. 2-1 (June 10, 1986))); Phillips Petroleum Co. v. Department of Energy, 449 F. Supp. 760, 785 (D. Del. 1978) (“Deference has been accorded to the views expressed in staff manuals and other guidance issued to an agency’s personnel in several cases.”). Despite these holdings, courts do distinguish between such manuals and more informal interpretive statements. See, e.g., New York State Dep’t of Social Serv. v. Bowen, 835 F.2d 360, 364-366 (D.C. Cir. 1987) (holding that informal interpretive statements made by agency staff members differ from and do not carry the weight of an official agency interpretation), cert. denied, 486 U.S. 1055 (1988).

25 See Pennzoil Co. v. Department of Energy, 680 F.2d 156, 160 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983); Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (Ct. Int’l Trade 1988) (“[A]lthough the Court deems a memorandum from a former official of an agency charged with administration of a statute to be persuasive authority, such a memorandum cannot be held an official pronouncement by the agency of the meaning of that statute.”); Dorchester Gas Producing Co. v. Department of Energy, 582 F. Supp. 911, 916 n.2 (N.D. Tex. 1983) (holding that although interpretations issued from the DOE’s Regional Director of Compliance constitute informal advice and are not official, the DOE’s Office of General Counsel issues official interpretations).


28 See, e.g., Vietnam Veterans of Am. v. Secretary of the Navy, 843 F.2d 528, 540 (D.C. Cir. 1988) (affidavits of the President of the Army’s Discharge Review Board (DRB) and the Chief of the Air Force’s DRB submitted as evidence); California ex rel. Dep’t of
regulated entities about the meaning and content of regulatory provisions.\textsuperscript{30}

The federal courts have disagreed about how to treat these statements. Many courts are reluctant to defer to individual statements and are particularly disinclined to defer to statements by inferior officials. As the Temporary Emergency Court of Appeals (TECA) stated in \textit{Pennzoil Co. v. Department of Energy},\textsuperscript{31} only interpretations that are "institutional in character" are entitled to

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Transp. v. United States, 561 F.2d 731, 733 n.4 (9th Cir. 1977) (affidavit of a Federal Highway Administration official entered as evidence of agency interpretation).

\textsuperscript{30} See, e.g., Masters, Mates & Pilots Pension Plan v. USX Corp., 900 F.2d 727, 732 n.4 (4th Cir. 1990) (expressing concern about deferring to interpretations rendered by agency counsel, but deferring to positions taken in an \textit{amicus curiae} brief concluding that they reflected the agency's rather than counsel's views); Eastern Paralyzed Veterans Ass'n v. Sykes, 676 F. Supp. 597, 602-04 (E.D. Pa. 1987) (Department of Transportation submitted \textit{amicus curiae} memorandum of law interpreting and explaining its regulations in private litigation; court treated the brief as an administrative interpretation and deferred to the conclusions contained therein.); see also United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858-59 n.25 (1975) (SEC filed an \textit{amicus curiae} brief urging the Supreme Court to adopt a particular interpretation of the federal securities law., reh'g denied, 423 U.S. 884 (1975); Gomez v. Department of the Air Force, 869 F.2d 852, 860-61 (5th Cir. 1989) (The court noted the rule of deference and asked the agency to submit supplemental briefs defining its position. The court considered the briefs, but found them unhelpful). But see American Fed'n of Gov't Employees v. Federal Labor Relations Auth., 840 F.2d 947, 952 (D.C. Cir. 1988) (concluding that the court need not treat as binding an interpretation of a rule in a brief submitted to the Federal Labor Relations Authority by Counsel for the General Services Administration.); Federal Labor Relations Auth. v. Department of Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (treating the prior interpretation of agency's position as official position rather than interpretation submitted in \textit{amicus curiae} brief on behalf of the agency purporting to alter the agency's interpretation of a regulation); Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (rejecting interpretation offered by agency in \textit{amicus curiae} brief).

\textsuperscript{31} See, e.g., \textit{Pennzoil}, 680 F.2d at 169-72. Such statements "are to be given little weight, as such, unless they are institutional in character." \textit{Id.} at 171; see also \textit{Dorchester Gas}, 582 F. Supp. at 916 n.2 (holding that letters and memoranda from agency officials provide informal advice but carry "little weight for purposes of regulatory interpretation").

The courts have confronted such interpretive statements in a variety of other contexts. See, e.g., Arizona Elec. Power Coop. v. FERC, 631 F.2d 811, 815 (D.C. Cir. 1980) (El Paso, an intervenor, relied on interpretive testimony by a Federal Power Commission staff member, in hearings on its interim curtailment plan. The Court rejected the claim that such reliance was proper, noting that the testimony "was far removed from the type of specific guidance" required.); \textit{Phillips Petroleum}, 449 F. Supp. at 784-85 ("[P]laintiffs cite numerous public statements by FEA personnel . . . and contend that the FEA construed the regulations . . . during the relevant period [in accordance with those interpretations]. The FEA attempts to dismiss the pronouncements . . . as clearly erroneous and merely the unauthorized and unofficial views of several of the agency auditors." The court concluded that "the opinions of the FEA's auditors and compliance officials do not deserve significantly less deference solely because these officials were not authorized to issue binding interpretations of the regulations.")

deference. In *Pennzoil*, the Court held that statements "authored by agency staff or individual Commissioners 'cannot be considered as... official expression[s] of the will and intent of the [agency].'" In *Copperweld Corp. v. United States*, the General Counsel of the International Trade Commission rendered an interpretation to one of the agency's commissioners. The court refused to treat the interpretation as an "official pronouncement by the agency of the meaning of... [the] statute." At best, the statement would be regarded as "persuasive authority." In *Dorchester Gas Producing Co. v. Department of Energy*, the Department of Energy's Region VI Director of Compliance sent a letter advising Texaco regarding the meaning and application of regulatory provisions. The court concluded that this letter was "in the nature of informal advice [given] by agency employees," and was therefore "to be accorded little weight for purposes of regulatory interpretation."

The *Pennzoil* court's distinction, between statements that are institutional and those that are not, finds support in at least one United States Supreme Court decision. The Court has not definitively addressed the issue. However, in *Miller v. Youakim*, a regional official in what was then the Department of Health, Education, and Welfare (HEW), sent an interpretation to state officials. This interpretation had not been approved by HEW's national office. Later, HEW issued a "Program Instruction" contrary to the unapproved interpretation. The Supreme Court, concluding that the Program Instruction was "the agency's first and only national interpretation" of the relevant provision, deferred to the Program Instruction and disregarded the regional official's prior unapproved interpretation.

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32 Id. at 171; see also Diaz, 648 F. Supp. at 645 (stating that "some courts have ruled that 'non-institutional' opinions, such as informal letters by agency staff or interpretations by an agency attorney, are entitled to little, if any, deference"); *Dorchester Gas*, 582 F. Supp. at 916 n.2 (holding that "informal advice by agency employees which do not have the stature of official agency interpretations... are to be accorded little weight for purposes of regulatory interpretation").


35 Id.

36 Id.


38 Id. at 916 n.2.


40 See id. at 144 n.25.
Despite these holdings, many courts consider, and at times, defer to individual interpretations.41 In *Diaz v. INS*,42 the court refused to follow *Pennzoil* because "the Ninth Circuit has deferred to opinions that apparently received neither top level approval nor had national application."43 *Keeffe v. Library of Congress,*44 involved the Library of Congress’s conflict of interest regulations interpreted by the Director of the Library’s Congressional Research Service. The District of Columbia Circuit treated the Director’s interpretation as the agency’s interpretation: "[W]e will not disturb the reasonable judgment of an agency of Congress as to the meaning of its own regulations."45

In other cases, courts have "considered" individual statements for a variety of purposes. In *Phillips Petroleum Co. v. Department of Energy,*46 the court rejected the Department of Energy’s argument that "only the FEA’s General Counsel and his staff had the authority to issue official interpretations of its regulations."47 The court concluded that statements made by auditors and other lower-level officials had "value as evidence of contemporaneous construction."48 Even the TECA, which decided *Pennzoil*, held in a prior decision, *Standard Oil Co. v. Department of Energy,*49 that "statements by ... FEA auditors and other lower level officials" could be considered.50

These diverse decisions cannot be entirely reconciled. They can be partially explained. In some cases, such as *Phillips Petroleum
and Standard Oil, courts did not actually defer to individual statements. Rather, they used those statements for collateral purposes. But, some courts do defer. Thus, as the holdings in Diaz and Copperweld suggest, courts simply disagree regarding the treatment of individual statements. As Diaz shows, some courts are more inclined to defer to these statements than others.

The difference between these two lines of cases is not as great as the rhetoric might suggest. Most courts accept Pennzoil's holding that interpretations must be "institutional in character" before they are entitled to deference, and they recognize that some individual statements are entitled to deference. However, courts disagree about which individual statements deserve deference. Pennzoil holds that only those statements that have received high level acceptance and approval deserve deference. Diaz agrees that only authoritative interpretations are entitled to deference, but its analysis allows courts to treat a wider array of interpretations as authoritative. In that case, the court was willing to consider as authoritative an interpretation by the District Director of the INS's San Francisco office. Under decisions like Pennzoil, Copperweld, and Dorchester Gas, such an interpretation would probably have been rejected as insufficiently authoritative.

II. FORMAT REQUIREMENTS

Judicial difficulties with individual statements stem, in part, from the absence of "format requirements." Deference principles were judicially created, and the courts have never developed clear rules regarding when deference should be given. Courts have not, for example, required agencies to state their interpretations in the form of legislative rules or adjudicative decisions. In addition, they have not required agencies to publish their interpretations as interpretive rules pursuant to Administrative Procedure Act (APA) provisions. Those provisions exempt interpretive rules from rule-making requirements, but require agencies to publish "statements

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51 See infra part IV.
52 Pennzoil, 680 F.2d at 171.
55 See id. § 553(b)(3)(A).
of general policy or interpretations of general applicability formulated and adopted by the agency" in the Federal Register. Instead, courts tend to evaluate interpretations on an \textit{ad hoc} basis.

Some courts do impose procedural limitations. In \textit{Mobil Oil Corp. v. Tully}, the court refused to defer an individual statement. The question was whether a federal statute preempted state law. Even though the responsible agency had not taken a position on the issue, the agency's Acting General Counsel wrote a letter to the Special Counsel of the New York State Tax Commission stating his belief that the act brought about a limited displacement of state law. The court held that the General Counsel's opinion could not be regarded as the agency's interpretation.

The United States Supreme Court has had little to say about the format issue. The notable exception is the Court's recent holding in \textit{Martin v. Occupational Safety & Health Review Commission}. In that case, the Court deferred to an interpretation, embodied in the Secretary of Labor's citation. The Court justified its decision by distinguishing between those interpretations that are created as an "exercise of the agency's delegated lawmaking power," and those that are not. The Court deferred to the Secretary's citation because it "assume[d] a form expressly provided for by

\textit{Id. at 501-02.}

\textit{Id. at 502.}

\textit{Id. at 502.}

\textit{Id. at 502.}

\textit{Id. at 502.}
Congress.63 The decision suggested that other interpretations, particularly those stated as interpretive rules or in enforcement guidelines, might be entitled to less deference.64

The Court did not clearly define the standard of review to be applied, but it suggested that interpretations that do not involve an exercise of delegated lawmaking authority would not receive actual deference. Thus, the Court seemed to indicate that the lower courts should apply a variable deference standard. Some interpretations would receive actual deference as per the Court's prior holding in Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.,65 under which interpretations involving an exercise of delegated lawmaking authority should be accepted provided they are "reasonable" or are not "arbitrary, capricious, or manifestly contrary to the statute."66 Such interpretations would receive actual deference ("Chevron" deference). Other interpretations, those that do not involve an exercise of "delegated lawmaking authority," would not receive actual deference. Rather, under Skidmore v. Swift & Co.,67 courts should independently determine a provision's

63 Id., 111 S. Ct. 1179.
64 See id., 111 S. Ct. 1179. The Court stated that such other interpretations are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers." Id., 111 S. Ct. 1179.
65 467 U.S. 837 (1984). The Environmental Protection Agency (EPA) promulgated a regulation to implement a permit requirement of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685. The EPA, counter to an earlier lower court decision, interpreted the term "stationary source" to include an entire industrial plant, rather than an individual source of pollution. The Court found the EPA construction of the term permissible. Thus, despite a change in the agency's own interpretations, the Court deferred to the EPA's construction.
"The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.
Id. at 843-44 (footnotes omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).
67 323 U.S. 134 (1944). Employees brought an action under the Fair Labor Standards Act, now codified at 29 U.S.C. § 201 (1988), regarding overtime pay and inactive duty. The Administrator's view, in rulings, interpretations, and opinions, was that employees were not entitled to include sleeping and eating time. The court took note of these interpretations, but held that such interpretations did not control decisions of the courts.
meaning, giving the agency's interpretation the weight it deserves considering its persuasiveness. These interpretations need only be "considered" ("Skidmore" deference).

Whether the Court really intended to adopt a "delegated lawmaking authority" standard is unclear. What is clear is that such a standard does not provide courts with a complete solution to the problem of individual interpretations. In ordinary parlance, when one speaks of agencies having "lawmaking authority," one thinks of their authority to promulgate legislative rules. SEC v. Chenery Corp. (Chenery II) expands the definition of "lawmaking authority" by holding that agencies are free to create new rules either legislatively or adjudicatively. Martin extends this analysis still further by holding that the Secretary of Labor's citations constitute an exercise of lawmaking authority. Thus, it is difficult to determine precisely what a "delegated lawmaking authority" standard means. In any event, under any definition of the phrase individual agency employees, including subordinates, can and do exercise delegated lawmaking authority. Thus, even under Martin's standard, a reviewing court might defer to individual statements.

Professor Robert Anthony, in a recent article, offers a somewhat different approach to the format issue. Anthony also distinguishes between Chevron interpretations and Skidmore interpretations, but he would impose relatively strict format requirements for Chevron interpretations, but few requirements for Skidmore interpretations. For Chevron interpretations, he would have courts ask whether "Congress intended to delegate to the agency the power to interpret with the force of law in the particular

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68 The Court in Skidmore suggested that the weight given to an interpretation would depend on a variety of factors, including, "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all [other] factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

69 See Weaver, supra note 53, at ___.

70 332 U.S. 194 (1947). In SEC v. Chenery Corp., 318 U.S. 80 (1943) (Chenery I) the Court reversed the Commission's order, and remanded, to the SEC. On remand, the Commission reached the same result but based its decision on standards contained in the Public Utility Holding Company Act of 1935. The Commission's later decision reached the Supreme Court on certiorari as Chenery II. See SEC v. Chenery Corp., 332 U.S. 194 (1947) (Chenery II).

71 See Chenery II, 332 U.S. at 201-03.

72 See infra text accompanying notes 121-38 & 184-92.

73 See Anthony, supra note 53.

74 See id. at 3 n.4.
format that was used." He would also require that this delegation be express: "[The agency] must enjoy a separate delegation of power to pronounce interpretations with the force of law in the format it uses." For Skidmore interpretations, Anthony would impose few, if any, requirements. Because courts need not actually defer to such interpretations, there is no reason to demand that such interpretations be stated in a particular form.

I find Anthony's test unworkable because of his focus on congressional intent. It is very difficult to know, in a given case, whether Congress intended for agency interpretations issued in a particular format to be binding. Congressional intent is an elusive concept that has been much criticized, and is often difficult to ascertain. There are some instances in which Congress provides

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75 Id. at 4.
76 Id. at 36.
77 Id. at 3 n.4; see also Cass R. Sunstein, Law and Administration after Chevron, 90 Colum. L. Rev. 2071, 2093-94 (1990) (footnotes omitted):

Chevron involved a "legislative rule," that is a rule issued by an agency pursuant to a congressional grant of power to promulgate regulations. For reasons suggested above, it is plausible to think that the legislative grant of rulemaking power implicitly carries with it the grant of authority to interpret ambiguities in the law that the agency is entrusted with administering. Somewhat more broadly, Chevron might be taken to suggest that whenever an agency is entrusted with implementing power—whether to be exercised through rulemaking or adjudication—agency interpretations in the course of exercising that power are entitled to respect so long as they are reasonable.

If this is the basis for Chevron, the principle of deference does not extend to interpretations by agencies that have not been granted the authority to interpret the law. For example, agencies that have been entrusted with the power to prosecute violations but not to make rules lack the pedigree that is a prerequisite for deference. It follows that even if an agency has been given the power of interpretation through rulemaking, it is not entitled to deference if it did not exercise rulemaking power in the particular case. It follows even more clearly that mere litigating positions are not entitled to deference. And if this is so, Chevron applies only when an agency is exercising the power to make rules or otherwise carrying out legislatively delegated interpretive authority.

This basic idea goes a long way toward making sense of the entire dispute over the reach of Chevron. In a recent case, the Court made precisely this point, suggesting that a "precondition to deference under Chevron is a congressional delegation of administrative authority." Indeed, Justice Scalia, an enthusiastic defender of the Chevron principle, has argued for a distinction very much like this one. If agencies are simply interpreting a statute, but have not been granted the power to "administer" it, the principle of deference should not apply. And if Chevron does not apply outside of the context of delegations of law-interpreting power, it is consistent with a well-established body of previous law.
explicit interpretive authority to agencies and indicates the format to be used. The obvious example (and perhaps the only one) is when Congress makes an express delegation to an agency authorizing it to promulgate substantive rules. In most instances, congressional intent is stated vaguely at best. Congress rarely provides much guidance concerning the form an administrative interpretation should take. It has not, for example, passed a "Deference to Regulatory Interpretations Act." Thus, most determinations of congressional intent must be based on a general assessment of agency authority. But, when this is done, courts sap the force from a congressional intent theory. Even if Anthony's test were workable, it does not provide a complete solution to the individual statement problem. As Anthony recognizes, some individual statements may be entitled to deference under his test.  

Interestingly, the format debate has been largely ignored by the lower federal courts. My review of some two hundred or more cases suggests that, although courts are more deferential to interpretations issued pursuant to delegated lawmaking authority, they rarely require such authority as a precondition to deference. In addition, courts rarely inquire whether the agency had a separate delegation of authority to "pronounce interpretations with the force of law in the format it uses." Most courts tend to evaluate administrative interpretations on an ad hoc basis, and they often fail to distinguish between *Chevron* interpretations and *Skidmore* interpretations.

These evaluations, while not always consistent, tend to fit into discernible patterns. Courts are more deferential to interpretations

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(1975); Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407, 409 (1950) ("[I]t is a hallucination, this search for intent. The room is always dark. The hat we are looking for is often black. If it is there at all, it is on our own head."); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947) ("Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean."") (quoting letter from Justice Holmes, addressee unknown)); Warren Lehman, *How To Interpret a Difficult Statute*, 1979 WIS. L. REV. 489, 499-501 ("[T]he intent of the legislature is a phantom because the will of the legislature is a metaphor."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930) ("A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.").

80 Id. at 36.
stated in legislative rules,81 or final adjudicative decisions.82 But courts also sometimes defer to interpretations that are not stated in these forms, have not received the agency's formal stamp of approval, and have not been published in accordance with APA requirements.83 Courts even defer to interpretations that are not

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81 See, e.g., *Chevron*, 467 U.S. at 843-44; Illinois v. FAA, 832 F.2d 168, 171 (D.C. Cir. 1987) (holding court bound to defer to reasonable interpretation of statute by agency administering it and citing *Chevron*).

82 See, e.g., Illinois v. FAA, 832 F.2d 168 (D.C. Cir. 1987).


In a few cases, litigants have challenged interpretive rules for failure to comply with APA procedures relating to the issuance of legislative rules. In *Deel v. Jackson*, 862 F.2d 1079 (4th Cir. 1988), in a somewhat misguided argument, plaintiff urged that deference was not required because the agency had not embodied its interpretation in the form of a substantive rule. The court disagreed noting that "[p]romulgation of a regulation, however, is not a prerequisite for according respect to an agency interpretation." *Id.* at 1087. The court went on to note:

In light of the consistency of the Secretary's position, we are persuaded that it is entitled to the "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Id.* (quoting *Chevron*, 467 U.S. at 844).

In a few other cases, courts have held that there are limits on agency authority to act by interpretation. These cases hold that when an agency issues a rule of general application, it must do so by legislative rule. See, e.g., Alaska v. Department of Transp., 868 F.2d 441, 445-47 (D.C. Cir. 1989) (holding that DOT regulations containing mandatory language and bright-line tests are legislative rules); First Bancorp. v. Board of Governors, 728 F.2d 434, 438 (10th Cir. 1984) (holding that Board of Governors of Federal Reserve Board abused discretion by making policy through adjudicative order); Ford Motor Co. v. FTC, 673 F.2d 1008, 1009-1010 (9th Cir. 1981) (concluding that Ford Motor Co.'s credit policies, which conformed to industry practices, constituted an unfair trade practice and that the FTC had abused its discretion in creating the contrary rule adjudicatively: "[A]gencies can proceed by adjudication to enforce discrete violations of *existing* laws where the effective scope of the rule's impact will be relatively small; but an agency must proceed by rulemaking if it seeks to change the law and establish rules of widespread application"), *cert. denied*, 459 U.S. 999 (1982); Bellano Int'l Ltd. v. FDA, 678 F. Supp. 410, 413 (E.D.N.Y. 1988) (holding that binding language of FDA Impact Alert makes it a legislative, not interpretive, rule and thus not subject to notice and comment procedures); Lee v. Kemp, 731 F. Supp. 1101, 1114 (D.D.C. 1989) (holding that policies contained in HUD handbook and memoranda had binding effect on decision makers and were thus legislative rules).

Most courts disagree. Agencies can, and frequently do, issue interpretive rules that
publicly available and that are not necessarily even available in permanent form. Courts have, for example, deferred to interpretations stated in enforcement orders. In addition, they have considered interpretations stated in circulars, affidavits, bulletins, memoranda, briefs submitted in litigation, as well as statements have general application. When the United States Supreme Court has dealt with this practice, it has upheld it. See, e.g., Bell Aerospace, 416 U.S. at 294 (allowing NLRB to announce new principles in adjudicative proceeding); California v. Lo-Vaca Gathering Co., 379 U.S. 366, 371 (1965) (allowing Federal Power Commission to use adjudicatory process to interpret statute); Cheney II, 332 U.S. at 202-03 (holding it within SEC's discretion to proceed case-by-case rather than through rulemaking procedure). Lower federal courts, in particular, give agencies much discretion. See, e.g., Greater Los Angeles Council on Deafness, Inc. v. Community Television of S. Cal., 719 F.2d 1017, 1022 (9th Cir. 1983) (finding no abuse of discretion in Department of Education's choice to enforce statute through adjudication), cert. denied sub nom., Gottfried v. United States, 467 U.S. 1252 (1984); Nevada Power Co. v. Watt, 711 F.2d 913, 927 (10th Cir. 1983) (ruling Department of Interior free to choose between rulemaking and adjudicative process in applying statute); Viacon Int'l, Inc. v. FCC, 672 F.2d 1034, 1042 (2d Cir. 1982) (holding that choice between rulemaking and declaratory order is for agency); NLRB v. American Can Co., 658 F.2d 746, 758 (10th Cir. 1981) (allowing administrative agency to rule on question of first impression in adjudicative process). See generally Russell L. Weaver, Cheney II: A Forty-Year Retrospective, 40 ADMIN. L. REV. 161, 188-90 (1988).

See, e.g., Skidmore, 323 U.S. at 138 (finding agency Administrator's interpretations worthy of note but not binding on Court: "He [the Administrator] has set forth his views . . . in an interpretive bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it"); Harris Trust & Savings Bank v. John Hancock Mut. Life Ins. Co., 722 F. Supp. 998, 1018 (S.D.N.Y. 1989) (holding that ERISA interpretive bulletin supported court's interpretation of statute).

See, e.g., Vietnam Veterans, 843 F.2d at 537 (holding memoranda issued by Secretary of Defense and his successor not binding on the courts).
made orally,⁹¹ or in congressional testimony.⁹² In the final analysis, Diaz’s conclusion—that “the case law does not suggest clear standards by which to distinguish the different types of statements”⁹³—is correct.

III. A Formula For Evaluation

Any standard for evaluating individual statements must, by definition, be somewhat vague because of the numerous contexts in which individual statements are rendered. Ultimately, a reviewing court must try to determine whether an individual statement is sufficiently authoritative. Congress delegates administrative authority to agencies, and it is their interpretations that courts must

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n.4 (4th Cir. 1990) (expressing concern about deferring to interpretations rendered by agency counsel, but deferring to positions taken in an amicus brief concluding that they reflected the agency’s views rather than counsel’s); Eastern Paralyzed Veterans Ass’n v. Sykes, 676 F. Supp. 597, 602-04 (E.D. Pa. 1987) (The Department of Transportation submitted an amicus brief interpreting and explaining its regulations in private litigation. The court treated the brief as an administrative interpretation and deferred to the conclusions contained therein.); see also Atkins v. Parker, 472 U.S. 115, 133 n.3 (1985) (Brennan, J., dissenting) (“[T]he Secretary’s position on the meaning of the ‘individual notice’ regulation was not presented until his reply brief was filed. Because this interpretation apparently has been developed pendente lite, the normal canon requiring deference to regulatory interpretations made by an agency that administers a statute . . . has no application here.”); United Hous. Found., Inc. v. Forman, 421 U.S. 837, 858 n.25 (1975) (noting deference given to agency interpretations but rejecting SEC view in amicus brief as contradictory to published Commission release); Gomez v. Department of the Air Force, 869 F.2d 852, 860-61 (5th Cir. 1989) (The court noted the rule of deference and asked the agency to submit supplemental briefs defining its position. The court considered the briefs, but found them unhelpful.); McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182, 1185 (E.D. Cal. 1988) (relying on Government’s briefs for interpretation of statutes at issue). But see American Fed’n of Gov’t Employees v. Federal Labor Relations Auth., 840 F.2d 947, 952 (D.C. Cir. 1988) (A General Services Administration lawyer offered his interpretation of a rule in a brief submitted to the Federal Labor Relations Authority. The court concluded that the interpretation was not binding.); Ames v. Merrill, Lynch, Pierce, Fenner & Smith, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (rejecting interpretation offered by agency in amicus brief).

⁹¹ See FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 438 (1986) (The Court concluded that the FDIC had a “longstanding and consistent” administrative interpretation. As proof of that interpretation, the Court pointed to FDIC official’s statement made in conversation with bank official. Ultimately, the Court deferred to the interpretation.).


respect. Thus, if courts defer to individual statements, they can do so only because the particular official exercised delegated authority, and did so under circumstances suggesting that deference is appropriate. As a result, Pennzoil's requirement—that interpretations be "institutional in character" before they are entitled to deference seems to provide a necessary gloss on the deference rule.

But, in deciding whether an interpretation is sufficiently institutional, no single factor is critical. A reviewing court must consider the individual's status within the agency. But status, by itself, is rarely determinative. In some situations, a district director's interpretation might be entitled to deference. In other situations, it might be properly disregarded. Courts must, therefore, make a detailed analysis of the context in which an interpretation was rendered. They might consider a variety of factors including the source of the interpretation and the setting in which the statement was made.

Professor Anthony's recent article offers some valuable insights into the problem. He recognizes that courts might justifiably defer to some individual statements, e.g., those made by the head of an agency or by his immediate delegates. He also recognizes that courts might defer to statements by other agency officials as well.

Anthony goes on to suggest other factors by which to evaluate individual statements, arguing for the consideration of at least two: "the completeness with which the agency heads themselves may have delegated their powers to the decision maker, and ... whether all levels of appeal within the agency were exhausted."

This analysis is quite valuable. An analysis of recent decisions offers much insight into the evaluation process.

A. Statements by High-Level Officials

Some agency officials have sufficient stature so that their interpretive statements might be regarded as official agency positions. The range of officials possessing such stature is extremely small.

* See Anthony, supra note 53.
* See id. at 51-52.
* See id. at 52. In reaching this conclusion, Anthony reverts to a congressional intent analysis. As suggested earlier, see supra notes 78-79 and accompanying text, this approach is ill-conceived.
The head of an agency might be able to speak for an agency, but it is doubtful that other officials would qualify for deference on this basis. For example, in a number of cases, courts have refused to defer to statements by an agency's general counsel. Interpretations by lower-level officials are not entitled to deference on this basis.

Even when an interpretation is rendered by the head of an agency, contextual analysis is essential. Deference should not be automatic. For example, in *Trustees for Alaska v. Hodel*, the Chairman of the Council on Environmental Quality (CEQ) offered his interpretation of a regulatory provision, and the Department of the Interior argued that this interpretation was entitled to controlling weight. The Ninth Circuit disagreed, noting that the CEQ was statutorily authorized to act as a whole and that the Chairman had no authority to act individually. Thus, the court refused to

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98 See, e.g., Gardebring v. Jenkins, 485 U.S. 415, 429-30 (1988) (In evaluating a challenged regulation, the Court noted that "[t]he Secretary [of Health and Human Services], who is responsible for enforcing the regulation, does not agree with the strict interpretation adopted by the District Court." The Court stated further: "[W]hen it is the Secretary's regulation that we are construing, and when there is no claim in this court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."); see also Caiola v. Carroll, 851 F.2d 395, 399 (D.C. Cir. 1988) (holding Defense Logistics Agency official's interpretation of regulation not dispositive because official was not head of the agency).

99 See Copperweld Corp. v. United States, 682 F. Supp. 552, 564 (Ct. Int'l Trade 1988) (An agency's general counsel rendered an interpretation to one of the agency's commissioners. The court refused to treat the interpretation as an "official pronouncement by the agency of the meaning of . . . [the statute."); Mobil Oil Corp. v. Tully, 653 F.2d 497, 501-02 (Temp. Emer. Ct. App. 1981) (An agency's acting general counsel stated his belief that the act at issue brought about a limited displacement of state law. The court held that the General Counsel's opinion could not be regarded as the agency's interpretation; Counsel had not followed the agency's established procedures governing the issuance of interpretations.), vacated on other grounds, 455 U.S. 245 (1982).

100 806 F.2d 1378 (9th Cir. 1986).

101 See Trustees for Alaska v. Hodel, 806 F.2d 1378, 1384 n.10 (9th Cir. 1986).

102 See id. The court stated:

Although asked to do so repeatedly at oral argument, the Department was unable to point to any basis for the Chairman's authority to interpret the regulations, other than the affidavit of the CEQ's General Counsel stating that the current CEQ Chairman has assumed sole responsibility for issues involving NEPA and that the General Counsel consults with the Chairman on the interpretation of the CEQ regulations. The statute creating the Chairman's position makes no reference to his duties. . . . The statute designating the duties of the Council refers to the Council as a whole. . . . Executive Order 11991 authorizing the Council to promulgate regulations does not grant the Chairman any special powers to interpret or administer the regulations. . . .

*Id.*
defer. It treated the statement as nothing more than the chairman’s personal view.\textsuperscript{103}

B. Designation

In some instances, agencies designate officials to make statements on their behalf. Such statements might be made in testimony before Congress\textsuperscript{104} or in judicial proceedings.\textsuperscript{105} In many instances, the courts have been willing to defer to these statements. For example, in \textit{California v. United States},\textsuperscript{106} the court deferred to an affidavit submitted by the manager of the Federal Highway Administration’s California Division Office. In the affidavit, the manager stated the agency’s position on the regulatory question rather than his own position.\textsuperscript{107} Similarly, in \textit{Vietnam Veterans of America v. Secretary of the Navy},\textsuperscript{108} plaintiffs argued that the Navy’s interpretation of a regulatory provision differed from the Army and Air Force’s interpretation. Plaintiffs based their argument on a random sampling of comparable cases decided by the Army and Air Force.\textsuperscript{109} The Navy argued that the three services had acted consistently, and offered in support affidavits from the President of the Army’s Discharge Review Board (DRB) and the Chief of the Air Force’s DRB.\textsuperscript{110} The court accepted the affidavits and concluded that there was no inconsistency.\textsuperscript{111}

Legitimate questions might be raised about the validity of decisions like \textit{Vietnam Veterans} and \textit{California v. United States}. In some respects, these decisions seem sound. If the testifying official does no more than state how the agency has interpreted a

\textsuperscript{103} The court concluded: “Thus, we are not convinced that the Chairman’s interpretation is ‘controlling’ or correct in this case.” \textit{Id.}


\textsuperscript{105} See, e.g., Vietnam Veterans of Am. v. Secretary of the Navy, 843 F.2d 528, 540 (D.C. Cir. 1988); California v. United States, 561 F.2d 731, 733 n.4 (9th Cir. 1977).

\textsuperscript{106} 561 F.2d 731 (9th Cir. 1977).

\textsuperscript{107} See \textit{id.} at 733 n.4.

\textsuperscript{108} 843 F.2d 528 (D.C. Cir. 1988).

\textsuperscript{109} See \textit{id.} at 539-40.

\textsuperscript{110} See \textit{id.} at 540.

\textsuperscript{111} See \textit{id.}.
regulatory provision, then it would seem that the court is simply deferring to the agency's interpretation. The individual's statement then represents nothing more than the format by which the agency has chosen to reveal its interpretation. On the other hand, how can the court be sure that the official has accurately stated the agency's position? When an agency has issued an interpretive ruling or bulletin, the agency's position is evident. But, an individual's understanding of agency policy may be flawed. As a result, some courts are skeptical of testimony or affidavits, especially when they are offered in contested proceedings. These courts generally require proof that the agency has taken the stated position and that the employee has accurately stated the content of that position.\textsuperscript{112}

C. Other Oral Statements

Courts have also deferred to other oral statements. A good example is provided by the Supreme Court's holding in \textit{FDIC v. Philadelphia Gear Corp.}\textsuperscript{113} In that case, the agency's interpretation was not stated in a permanent form, such as a legislative regulation. However, a bank official had made a statement, setting forth the agency's position, during a public meeting.\textsuperscript{114} Because the statement

\textsuperscript{112} Illustrative is the holding in Ames v. Merrill, Lynch, Pierce, Fenner & Smith, 567 F.2d 1174, 1177 n.3 (2d Cir. 1977):

The Commission filed a brief \textit{amicus curiae} in which it argues that the district court was wrong in holding that § 180.3 should not be applied to disputes arising after the date of the regulation under existing agreements, but that it was probably right in not applying the regulation to disputes antedating the regulation, as in this case. We recognize that the Commission staff thought it easier to argue in favor of retroactive application of the regulation to preexisting contracts if they surrendered the claim to retroactive application to preexisting disputes. We do not share their concern...\textsuperscript{115} The Commission cites no administrative precedent, nor does it suggest that there has been any practical construction by the Commission which it could urge us to accept on the ground that the Commission has, in the past, so "interpreted" the regulation. We cannot accept the Commission's current litigating position as an "interpretation" by the Commission, which the dissenting opinion calls it.\ldots

\textsuperscript{113} 476 U.S. 426 (1986).

\textsuperscript{114} The Court summarized the statement in the following way:

Although the FDIC does not argue that it has an express regulation excluding a standby letter of credit backed by a contingent promissory note from the definition of "deposit" in 12 U.S.C. § 1813(i)(1), that exclusion by the FDIC is nonetheless longstanding and consistent. At a meeting of FDIC and bank officials shortly after the FDIC's creation, a bank official asked whether a letter of credit issued by a charge against a customer's account was a deposit. The FDIC official replied:

"If your letter of credit is issued by a charge against a depositor's account or
was supported by the agency's claims of consistent application,\textsuperscript{115} and by administrative practice,\textsuperscript{116} the Court chose to defer.\textsuperscript{117}

D. Adoption By the Agency

In some instances, agencies adopt individual statements as their own. For example, in \textit{Pyramid Lake Paiute Tribe of Indians v. Hodel},\textsuperscript{118} the Regional Director of the Bureau of Reclamation, of

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...for cash and the letter of credit is reflected on your books as a liability, you do not have a deposit liability. If, on the other hand, you merely extend a line of credit to your customer, you will only show a contingent liability on your books. In that event no deposit liability has been created." Transcript as quoted in FDIC v. Irving Trust Co., 137 F. Supp. 145, 161 (S.D.N.Y. 1955).

Because Penn Square apparently never reflected the letter of credit here as a noncontingent liability, and because the interwoven financial instruments at issue here can be viewed most accurately as the extension of a line of credit by Penn Square to Orion, this transcript lends support to the FDIC's contention that its longstanding policy has been to exclude standby letters of credit backed by contingent promissory notes from 12 U.S.C. § 1813(l)(1)'s definition of "deposit."


\textsuperscript{115} The Court noted:

The FDIC's contemporaneous understanding that standby letters of credit backed by contingent promissory notes do not generate a "deposit" for purposes of 12 U.S.C. § 1813(l)(1) has been fortified by its behavior over the following decades. the FDIC has asserted repeatedly that it has never charged deposit insurance premiums on standby letters of credit backed by contingent promissory notes, and Philadelphia Gear does not contest that assertion.

\textit{Id.} at 438-39.

\textsuperscript{116} The Court summarized the situation as follows:

Congress requires the FDIC to assess contributions to its insurance fund at a fixed percentage of a bank's "deposits" under 12 U.S.C. § 1813(l)(1). See 12 U.S.C. §§ 1817(a)(4), (b)(1), (b)(4)(A). By the time that this suit—the first challenge to the FDIC's treatment of standby letters of credit backed by contingent promissory notes—was brought, almost $100 billion in standby letters of credit was outstanding. See Board of Governors of the Federal Reserve System, Annual Statistical Digest 71 (1983); FDIC, 1983 Statistics on Banking (Table 110F). The FDIC's failure to levy premiums on standby letters of credit backed by contingent promissory notes therefore clearly demonstrates that the FDIC has never considered such letters to reflect deposits.

\textit{Id.} at 439.

\textsuperscript{117} The Court stated:

Although the FDIC's interpretation of the relevant statute has not been reduced to a specific regulation, we conclude nevertheless that the FDIC's practice and belief ... are entitled in the circumstances of this case to the "considerable weight [that] should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."


\textsuperscript{118} 882 F.2d 364 (9th Cir. 1989).
the Department of the Interior, rejected a request based on his interpretation of the agency's operating criteria. The lower court refused to defer to this interpretation noting that the Regional Director was "about as low on the bureaucratic totem pole as one can get for the purpose of rule interpretation." The Ninth Circuit disagreed, noting that the Regional Director had chaired a committee that recommended the criteria, and that the Secretary's "vigorouss defense of that interpretation in the court below and in this court" suggested that the agency had adopted the interpretation. Of course, the interpretation might have been upheld on the basis that the official decided a contested case and, therefore, exercised delegated authority.

E. ALJ Interpretations

How should the interpretation of an Administrative Law Judge (ALJ) be treated? Some courts regard such interpretations as authoritative, but the law in this area is complex, and can vary from agency to agency. In the Department of Health and Human Services (HHS), ALJ decisions are reviewable by the agency's Appeals Council. Although an ALJ's determination might ordinarily be accorded considerable weight, a conflicting interpretation by the Council will override it. Under OSHA regulations, a hearing officer's decision that is not reviewed by the full Commission is not treated as binding precedent, and it does not "nec-

119 Pyramid Lake Paiute Tribe of Indians v. Hodel, 882 F.2d 364, 370 (9th Cir. 1989).
120 See id.
121 See, e.g., Fluor Constructors, Inc. v. Occupational Safety & Health Review Comm'n, 861 F.2d 936, 939 (6th Cir. 1988) (Secretary issued a citation for a serious violation based on his interpretation of regulatory requirements. The ALJ ultimately affirmed the Secretary's interpretation.).
122 See, e.g., Baker v. Heckler, 730 F.2d 1147, 1150 (8th Cir. 1984). In Baker, the court stated: The Secretary has chosen to act through the Appeals Council, and therefore it is the Council's decision that must be deferred to by the courts if substantial evidence exists to support it, whatever the result might have been if the courts were reviewing the ALJ's decision directly. Id. at 1150; see also Mullen v. Bowen, 800 F.2d 535, 545 (6th Cir. 1986) (upholding Council's denial of disability benefits to claimant when sufficient evidence supported the refusal).
123 See In re Cerro Copper Prod. Co., 752 F.2d 280, 284 (7th Cir. 1985) (holding unreviewed ALJ decision not binding precedent for OSHRC or the courts); Willamette Iron & Steel Co. v. Secretary of Labor, 604 F.2d 1177, 1180 (9th Cir. 1979) (holding that hearing officer decision lacking full commission review does not constitute precedent binding the commission), cert. denied, 445 U.S. 942 (1980).
necessarily [express] the views of the Commissioners, or [declare] Commission policy."\textsuperscript{124}

Even when agency regulations or practices do not preclude deference to ALJ interpretations, some courts are reluctant to treat such interpretations as controlling. For example, in *Donovan v. Anheuser-Busch, Inc.*,\textsuperscript{125} a commission failed to review an ALJ's decision. Nevertheless, the court held that the ALJ's decision did not constitute binding precedent.\textsuperscript{126} It did not "necessarily [express] the views of the Commissioners or [declare] Commission policy."\textsuperscript{127} In *Kwan v. Donovan*,\textsuperscript{128} the Secretary's interpretation was both "reasonable and consistent with the statute."\textsuperscript{129} The ALJs had, however, rendered inconsistent interpretations. The court chose to defer to the agency's interpretation, noting that the "fact that administrative law judges within the Department of Labor may have employed inconsistent interpretations of business necessity prior to the promulgation of the Secretary's interpretation is irrelevant."\textsuperscript{130}

In each case, judicial evaluation of ALJ interpretations is heavily dependent on context. In most instances, if an ALJ's decision becomes final, courts will treat that decision as the agency's interpretation and will defer.\textsuperscript{131} Of course, if the agency reviews and overturns the decision, the ALJ's interpretation does not constitute

\textsuperscript{124} *Willamette Iron*, 604 F.2d at 1180 (citation omitted).
\textsuperscript{125} 666 F.2d 315 (8th Cir. 1981).
\textsuperscript{126} See *Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 326 (8th Cir. 1981); see also *RMI Co. v. Secretary of Labor*, 594 F.2d 566, 571 n.13 (6th Cir. 1979) ("RMI has argued that this determination was unreasonable as contrary to numerous ALJ decisions. The OSHRC is not bound by unreviewed ALJ decisions so we see no merit to this argument.").
\textsuperscript{127} *Anheuser-Busch*, 666 F.2d at 326 (quoting *Willamette Iron*, 604 F.2d at 1180 (citation omitted)). The *Anheuser-Busch* court also noted that deference might not be required because the ALJ was interpreting judicial precedent rather than a statute or regulation. See *id*.
\textsuperscript{128} 777 F.2d 479 (9th Cir. 1985).
\textsuperscript{129} *Kwan v. Donovan*, 777 F.2d 479, 482 (9th Cir. 1985).
\textsuperscript{130} *Id*.
\textsuperscript{131} See, e.g., *Fluor Constructors*, 861 F.2d at 939 ("The ALJ affirmed the violation. After the Commission failed to direct discretionary review, the ALJ's Decision and Order became the final order of the Commission. ... "); *Oakland County Bd. of Comm'r's v. Department of Labor*, 853 F.2d 439, 442 (6th Cir. 1988) ("The ALJ's decision and order is the final decision of the Secretary unless the nonprevailing party files exceptions. ... [I]f exceptions are filed, the decision of the ALJ becomes the final decision of the Secretary unless the Secretary notifies the parties ... that the case has been accepted for review."); *Donovan v. A.A. Beiro Const. Co.*, 746 F.2d 894, 905 (D.C. Cir. 1984) ("The ALJ decision became a final order when no Commissioner directed review. ").
the agency's position. In some circumstances, even though it appears that an ALJ's interpretation has been affirmed, it will be entitled to little weight. In *Bethlehem Steel Corp. v. Occupational Safety & Health Review Commission*, the Secretary of Labor cited petitioner for a non-serious safety violation. An ALJ decision confirming the citation interpreted the regulation in question. The Commission sustained the decision. As a result, it seemed that the Commission had confirmed the ALJ's interpretation. That was not the case. Of the three commissioners, one recused himself and the other two were equally divided on the interpretive question. The agency's position was further muddled by the fact that, in a prior case, a divided Commission had decided the interpretive question the opposite way. The court concluded that the agency had not taken an authoritative position and decided to interpret the regulation itself.

**F. Litigative Interpretations**

Courts have experienced particular problems with litigative interpretations. These statements take many forms. Agency attorneys

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132 See, e.g., *Baker*, 730 F.2d at 1150 (Administrative law judge initially decided a case, but was overruled by the agency's Appeals Council. The court noted that, had the Appeals Council not decided to review the matter, the ALJ's determination would have been final and would have represented the agency's interpretation of the provision in question. But, when the Appeals Council reversed, its interpretation became the agency's position. Thus, the Appeals Council's interpretation was the one entitled to deference.).

133 573 F.2d 157 (3d Cir. 1978).

134 See *Bethlehem Steel Corp. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 157, 158 (3d Cir. 1978).

135 See id.

136 See id. at 163 n.4.

137 See id. at 163.

138 The holding in *Bethlehem Steel* is incorrect. The case involved the Occupational Safety and Health Act, which is jointly administered by the Secretary of Labor and the Commission. Even though the Commission could not agree regarding the regulation's meaning, the Secretary of Labor had interpreted the provision. In *Martin v. Occupational Safety & Health Review Commission*, ___ U.S. ___, 111 S. Ct. 1171 (1991), the United States Supreme Court held that the Commission was required to defer to a reasonable interpretation by the Secretary of Labor. See *id.* at ___, 111 S. Ct. at 1180-1181. In *Bethlehem Steel*, the court ignored the Secretary's interpretation. For an examination of the *Martin* decision, see *Inter-Agency Conflicts, supra* note 8.

If a different regulatory scheme had been involved, one which did not involve a division of authority between two different agencies, the decision would have made sense. If only two commissioners decided the case, and they were equally divided, then it is difficult to argue that the Commission had decided the regulation's meaning. This is particularly true given that the only prior decision involved a split decision interpreting the regulatory provision the opposite way.
construe regulatory provisions in briefs, and other officials submit affidavits or testify regarding their interpretations of regulatory provisions. The federal courts have generally been skeptical of litigative interpretations and have been reluctant to defer. In Bowen v. Georgetown University Hospital, the United States Supreme Court flatly stated that it had "never applied" the deference rule to litigative interpretations. Despite this statement, in

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143 See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988). However, in Atkins v. Parker, 472 U.S. 115 (1985), the Supreme Court accepted a litigative interpretation. Dissenting Justice Brennan objected, noting that "[b]ecause this interpretation apparently has been developed pendente lite, the normal canon requiring deference to regulatory..."
at least two instances, the Supreme Court has accepted litigative interpretations. In *Gardebring v. Jenkins*, the Supreme Court deferred to an interpretation developed in litigation, noting that it was "properly hesitant" to ignore the Secretary’s interpretation. In *Atkins v. Parker*, the Supreme Court also accepted an interpretation developed during the course of litigation. Lower courts as well have deferred to litigative interpretations. In *Masters, Mates & Pilots Pension Plan v. USX Corp.*, the Fourth Circuit expressed its concern about deferring to interpretations rendered by agency counsel but deferred to positions taken in an *amicus* brief concluding that those positions reflected the agency’s views rather than counsel’s. In *Gomez v. Department of the Air Force*, the court noted the rule of deference and asked the agency to interpretations made by an agency that administers a statute . . . has no application here." *Id.* at 133 n.3 (citations omitted). He went on to state:

The record contains no evidence that food stamp program authorities have ever advanced a particular construction of the phrase prior to the litigation. Indeed, in his opening brief to this Court, the Secretary did not address the regulatory argument, but contended instead that "any argument, independent of the constitutional argument, that the Massachusetts notice was in violation of the Food Stamp Act or the 'mass change' regulations" should be left open to the recipients on remand. Brief for Federal Respondent 44, n.38. Thus the Secretary’s position on the meaning of the "individual notice" regulation was not presented until his reply brief was filed.

*Id.*

144 *See Gardebring, 485 U.S. 415; Atkins, 472 U.S. 115.*


146 The Court stated:

We recognize that the Secretary had not taken a position on this question until this litigation. However, when it is the Secretary’s regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are properly hesitant to substitute an alternative reading for the Secretary’s unless that alternative reading is compelled by the regulation’s plain language or by other indications of the Secretary’s intent at the time of the regulation’s promulgation.

*Id.* at 429-30.


148 *See id. at 183 n.3 (Brennan, J., dissenting).*

149 *See, e.g., Eastern Paralyzed Veterans Ass’n v. Sykes, 676 F. Supp. 597, 602-04 (E.D. Pa. 1987) (The Department of Transportation submitted *amicus curiae* brief interpreting and explaining its regulations in private litigation. The court treated the brief as an administrative interpretation and deferred to the conclusions contained therein.).

150 900 F.2d 727 (4th Cir. 1990).

151 *See id. at 732 n.4.*

152 *See id.* The court noted that "the PBGC, with their *amicus curiae* brief, has provided us with a sextant, enabling us to navigate our journey into uncharted, treacherous seas." *Id.*

153 869 F.2d 852 (5th Cir. 1989).
submit supplemental briefs defining its position. The court considered the briefs, but found them unhelpful.

The inconsistencies between these various lines of decision are partially explainable. Courts do reject litigative interpretations in most instances. The Supreme Court is particularly reluctant to defer to litigating positions that represent nothing more than counsel's post hoc rationalizations for agency action. As the Court recognized in *Chenery II*, a reviewing court "must judge the propriety of . . . [agency] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." Thus, courts view litigative interpretations skeptically, fearing that counsel may have developed an interpretation outside established procedures in an effort to gain litigative advantage.

The Court's reluctance to defer to litigative interpretations is premised on other considerations as well. As the Supreme Court noted in *Bowen*, it has consistently declined to defer to an agency counsel's interpretation of a statute when the agency itself has articulated no position on the question. The Court justified this position on the ground that "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."

Moreover, when courts defer to counsel's arguments, there is a significant risk

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155 See id.
156 In Jean v. Nelson, 472 U.S. 846 (1985), Justice Marshall dissenting, argued: Because the substantive criteria for parole have not changed during the course of this litigation, . . ., the Solicitor General's representations are flatly inconsistent with the Government's own position at trial; they reflect nothing but a change in the Government's litigation strategy. This is precisely the sort of post hoc rationalization that is entitled to no weight.
Id. at 866 n.5.
158 Id. at 196.
159 In *Federal Labor Relations Authority v. Department of Treasury*, 884 F.2d at 1455, the court noted: "[A] position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views. Indeed, where statutes specify procedures for a specific type of decision, one engendered solely in litigation will (typically) have skirted those procedures. . . ."
160 See *Bowen*, 488 U.S. at 212-13.
161 Id. at 212 (quoting Investment Company Institute v. Camp, 401 U.S. 617, 628 (1971)).
that the interpretation might not be followed or given credence by the agency itself in subsequent cases.162

When a "litigating position" does not involve counsel's post hoc rationalization, deference may be appropriate. In Martin v. Occupational Safety & Health Review Commission, the Supreme Court deferred to an interpretation contained in a citation.163 The Court rejected respondent's argument that the citation represented nothing more than the agency's "litigating position," and was therefore "undeserving of judicial deference."164 The Court began by reaffirming the general rule that "agency 'litigating positions' are not entitled to deference when they are merely appellate counsel's 'post hoc rationalizations' for agency action, advanced for the first time in the reviewing court."165 But, the Court emphasized

162 As the court stated in Federal Labor Relations Authority v. Department of Treasury, 884 F.2d at 1455 (citations omitted):
We can identify two basic concerns for reluctance to defer to agency counsel's litigating position. First, the position may not reflect the views of the agency head(s). Judicial reliance on such a position might (in the statutory interpretation context) lock an agency into a view it never espoused. . . . That risk may have been especially acute before Chevron made crystal clear that an agency interpreting a statute under an express or implied delegation of authority is free to modify its view. Quite apart from the potential lock-in, an agency informed that its stated reason was inadequate might reverse field; judicial affirmance on a basis never articulated by the agency could thus produce an unintended result and usurp the agency's function. . . .

163 See Martin, ___ U.S. at ___, 111 S. Ct. at 1180.
164 Id. at ___, 111 S. Ct. at 1178.
165 Id. at ___, 111 S. Ct. at 1179. In Jean, Justice Marshall, dissenting, complained about the court's reliance on a litigative interpretation. The Court had relied on statements made by counsel in oral argument before the Supreme Court. Marshall began by recognizing that, under Chevron, reasonable interpretations are entitled to a presumption of deference from the courts. But, he then noted that "[t]hese presumptions do not apply, however, to representations of appellate counsel," and to "appellate counsel's interpretation of regulations." He explained: "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands. It is the administrative official and not appellate counsel who possess [sic] the expertise that can enlighten and rationalize the search for the meaning and intent of Congress." (quoting Investment Co., 401 U.S. at 628). Jean, 472 U.S. at 865 (Marshall, J., dissenting).

Justice Marshall believed that the majority in Jean had violated these principles. He emphasized that counsel's representations were "not supported by citation to any authoritative statement by the Attorney General or the INS." Id. (Marshall, J., dissenting). Marshall observed that "except for some too-late formulations, apparently coming from the Solicitor General's office, we have been directed to no relevant indication that the administrative practice was to prohibit such distinctions." Id. at 865-66 (Marshall, J., dissenting) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 422 (1971)). Marshall concluded that the "Solicitor General's contention to the contrary is merely an unsupported assertion by counsel for a litigant; this Court owes it no deference at all." Id. at 866 (Marshall, J., dissenting).
that the prohibition against litigative interpretations applies only when an interpretation is advanced "after agency proceedings have terminated," rather than as part of an "exercise of the agency's delegated lawmaking powers." The Court concluded that deference was due the Secretary's citation because it "is agency action, not a post hoc rationalization of it."

Courts might consider litigative interpretations for other purposes as well. In some instances, an agency's final decision is met with claims of inconsistency. In other words, the challenging party argues that the agency has taken inconsistent positions, making the interpretation not entitled to deference. In this instance, counsel might supplement the record with proof of consistent application. This was done in *Vietnam Veterans*, which is discussed earlier. There, plaintiffs argued that the Navy's interpretation of a regulatory provision differed from the Army's and Air Force's interpretation, and the services offered affidavits to prove that they had acted consistently.

Some decisions go further, accepting counsel's interpretation of regulatory provisions to the extent that counsel does no more than state the agency's considered position regarding a provision's meaning. They usually do so when the agency's interpretation predates the litigation. But, in order to ensure that a particular interpretation is not a post hoc rationalization, these courts require proof that the interpretation represents the agency's previously adopted position. In *Bowen*, even though the Court rejected a

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166 *Martin*, ___ U.S. at ___, 111 S. Ct. at 1179.
167 Id.
168 843 F.2d 528.
169 See supra notes 108-11 and accompanying text.
170 See *Vietnam Veterans*, 843 F.2d at 540.
171 See id.
172 See *Bowen*, 488 U.S. at 212. The *Bowen* Court noted: "We have never applied the [deference] principle... to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." Id.
173 See *Federal Labor Relations Auth. v. Department of Treasury*, 884 F.2d at 1455 (adopting counsel's interpretation because it was consistent with prior administrative construction).
174 See *Ames*, 567 F.2d at 1177 n.3: The Commission filed a brief *amicus curiae* in which it argues that the district court was wrong in holding that § 180.3 should not be applied to disputes arising after the date of the regulation under existing agreements, but that it was probably right in not applying the regulation to disputes antedating the regulation, as in this case. We recognize that the Commission staff thought it easier to argue in favor of retroactive application of the regulation to
litigative interpretation, it limited its holding to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." Other courts have rendered similar holdings. For example, in Federal Labor Relations Authority v. Department of Treasury, the court treated an interpretation submitted in an amicus brief in a prior case as the agency's interpretation. But, the interpretation was adopted after due deliberation and had been confirmed by the agency head. As a result, the court chose to treat the interpretation as official.

Courts that refuse to defer to litigative interpretations offered by counsel may, perhaps, "consider" those interpretations (Skidmore deference) in appropriate cases. In most cases, unless the agency's decision can stand on its own merits, counsel's interpretation will be rejected under Chenery I. But, if the interpretation is offered under circumstances that do not implicate Chenery I, some courts will "consider" counsel's arguments. Obviously, when

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175 Bowen, 488 U.S. at 212-13.
176 884 F.2d 1446 (D.C. Cir. 1989).
177 See id. at 1455.
178 The court noted:

[W]e find nothing to justify such a concern. The way in which Director Horner adopted the brief as the official OPM statement seems in no respect to fall short of OPM's usual procedures for interpreting its routine use notice. Guidelines in the Federal Personnel Manual are drafted by OPM staff and approved by the Director, see Federal Personnel Manual, Chapter 711 at § 2.6(1) (June 24, 1986). This seems functionally indistinguishable from the legal staff's preparing the amicus brief and Director Horner's officially adopting it in her letter of June 25, 1987. Thus we have no reason to believe that the interpretive process here was any less thorough, less formal or less open than it would normally be. Nor, of course, did the position represent any kind of agency switch.

Id.

179 The court noted:

Ms. Horner, the agency head, has explicitly adopted the view of the amicus brief. There is no risk that counsel may have acted as "mavericks disembodied from the agency that they represent."

Id. (quoting Church of Scientology, 792 F.2d at 165 (Silberman, J., concurring)).
180 See id. at 1456 ("Thus, we believe it entirely appropriate to treat Mr. [sic] Horner's adoption of the amicus brief as an authoritative expression of the agency's views.").
181 See supra note 70.
counsel's interpretation differs from the agency's interpretation, counsel's interpretation will be viewed with suspicion and probably will be rejected. But, when the agency has not previously interpreted the regulation, at least one court has concluded that counsel's interpretation is entitled to a "modicum of respect."

G. Miscellaneous Statements

Subordinates make interpretive statements in a variety of other contexts. In some instances, courts have deferred to these statements. However, in most of these instances, the subordinate has exercised delegated authority and has rendered a final decision on the agency's behalf. For example, Keeffe v. Library of Congress involved the Library of Congress's conflict of interest regulations as interpreted by the Director of the Library's Congressional Research Service. The District of Columbia Circuit treated the Director's interpretation as the agency's interpretation: "We will not disturb the reasonable judgment of an agency of Congress as to the meaning of its own regulations." In Diaz v. INS, the court indicated that it would have deferred to a District Director's interpretation had it been reasonable.

One of the most interesting cases is California Molasses Co. v. California & Hawaiian Sugar Co. This case, in which the court deferred to conclusions reached by IRS field auditors, pushes the

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182 A court will reject counsel's interpretation when it conflicts with the agency's construction of a regulation. See Church of Scientology, 792 F.2d at 162 n.4 ("[Deference cannot be given when] counsel's interpretation in fact does not explain agency action but is, to the contrary, incompatible with the agency's settled course of conduct. That is the situation here. . . .").

183 American Fed'n of Gov't Employees, 840 F.2d at 952:
[Counsel's interpretation] plainly lacks the credentials of a position that agency heads have staked out after adjudicative or rulemaking procedures allowing a full vetting of alternatives. . . . Although we believe the GSA legal opinion certainly entitled to a modicum of respect, the exact degree is no matter as we believe its construction to be decidedly the better view.

184 777 F.2d 1573 (D.C. Cir. 1985).

185 Id. at 1578; see also Ganadera Indus., S.A. v. Block, 727 F.2d 1156, 1160 (D.C. Cir. 1984) (addressing situation where Department of Agriculture official withdrew appellant's privilege to import meat into the United States based on his own interpretation of regulatory requirements). But see Caiola, 851 F.2d at 399 (holding that "deference is inappropriate" and noting, inter alia, that "the only agency official to construe [the regulation] was . . . the DLA's debarring official, not the head of the agency").


187 See id. at 649.

concept of deference to its limits. The audit was supervised by an agent with thirteen years experience and two years of audit supervision experience. The auditors found that the California and Hawaiian Sugar Co. was in compliance with regulatory requirements, and that finding was given deference by the court. In deciding to defer, the court rejected claims that "the IRS rulings were routine reviews by local personnel and accordingly were of a type or level not entitled to the deference customarily given to administrative agency determinations." The court emphasized that the IRS "was charged with enforcing the price controls and its agents did have delegated authority and expertise in reviewing price control compliance."

Whether the California Molasses decision makes sense is debatable. The decision is justifiable in that the auditors acted under delegated authority, and their interpretation definitively resolved a matter within their authority. As a result, their interpretation was like ALJ decisions interpreting regulatory provisions, and should be analyzed in a comparable way. Deference is appropriate because the auditors' interpretation became the agency's interpretation. The audit reports were forwarded to the IRS's district office, which affirmed the decision. That office made its decision without forwarding reports to the agency's national office. Of course, if agencies allow auditors or those in district offices to make final interpretive decisions, then it will be difficult for those agencies to maintain control over the interpretation of their governing statutes and regulations. However, if the agency desires more control, and consistency of application, it can achieve these goals by undertaking national review of decisions by subordinates.

**H. Informal Advice**

Subordinate agency officials give informal advice to regulated entities, but few courts are willing to treat such advice as authoritative. This approach is sound. The *Pennzoil* case, which is

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190 Id. at 1235.
191 Id.
192 Id.
193 See Miller, 440 U.S. at 144 n.25 (A regional official sent an interpretation to state officials that had not been approved by the agency's national office. Later, HEW issued instructions that were contrary to the letter. The Court concluded that the Instructions were "the agency's first and only national interpretation" of the relevant provision.).
discussed earlier, presents this problem. There, several subordinate officials made interpretive statements. The court correctly refused to treat those interpretations as authoritative.

IV. COLLATERAL USES

When individual statements do not qualify for deference, that does not mean that they will be disregarded. Courts might use those statements in various ways.

A. Respect

In an appropriate case, even though an interpretation is not regarded as "official" and therefore entitled to deference, it might nonetheless be "considered" by a court and given a "modicum of respect." In Copperweld Corp. v. United States, a general counsel’s statement failed to qualify as an "official pronouncement by the agency [interpreting] the meaning of . . . [the] statute." But, the court still concluded that the statement could be regarded as "persuasive authority." Of course, judicial treatment of any interpretation will depend on circumstances. Courts do not routinely respect every statement by an agency official. On the contrary, they weigh the significance of the statement.

B. Vagueness

Some courts will consider individual statements when a regulatory provision suffers from vagueness or ambiguity. In L.R. Willson & Sons, Inc. v. Donovan, petitioner was cited for a violation of OSHA regulations and defended on the ground that the regulation was impermissibly vague. The court agreed, basing its decision, in part, on statements by subordinate OSHA offi-

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194 See supra notes 31-33 and accompanying text.
195 American Fed’n of Gov’t Employees v. Federal Labor Relations Auth., 840 F.2d 947, 952 (D.C. Cir. 1988): [Counsel’s interpretation] plainly lacks the credentials of a position that agency heads have staked out after adjudicative or rulemaking procedures allowing a full vetting of alternatives. . . . Although we believe the GSA legal opinion certainly entitled to a modicum of respect, the exact degree is no matter as we believe its construction to be decidedly the better view.
197 Id.
198 Id.
199 685 F.2d 664 (D.C. Cir. 1982).
The court placed particular emphasis on the fact that those officials had disagreed regarding the meaning of regulatory requirements, and found their disagreements to be particularly significant because "the regulations involved teeter[ed] precariously on the edge of the wall that divides adequate notice from impermissible vagueness." The court concluded that the regulation did "not adequately express" the agency's intent.

C. Deciding Whether to Defer

Courts have also considered individual statements in deciding whether an agency's seemingly authoritative interpretation of a regulatory provision deserves deference. Such use of individual statements would seem to be inappropriate. When an administrative agency has authoritatively interpreted a regulatory provision, it should make little difference that a subordinate official disagrees with the agency's interpretation. Within an agency, numerous subordinates may work on a regulatory scheme, and some of them are bound to disagree with the agency's interpretation. Under the deference rule, agencies are free to exercise discretion in their interpretation and application of regulatory provisions. As one court stated, an agency's interpretation "need not be the only reasonable one before we will sustain it." As a result, the fact

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200 See L.R. Willson & Sons, Inc. v. Donovan, 685 F.2d 664, 676 (D.C. Cir. 1982).
201 The court summarized the disagreement as follows:

[T]he record shows some disagreement on this issue between the compliance officers who conducted the inspection of Willson's worksite. It is uncontested that during the initial visit in February the OSHA officers informed James Willson that if either safety belts or safety nets were utilized he would be in compliance with the Act. At the hearing, however, one of the officers testified that both nets and safety belts were required.

Id. at 675 (footnotes omitted).

202 Id. at 676.
203 Id.
204 See Russell L. Weaver, Contemporaneous Construction Discovery: Its Use and Abuse, 20 Wake Forest L. Rev. 357, 368 (1984) [hereinafter Contemporaneous Construction Discovery].
206 Fluor Constructors, Inc. v. Occupational Safety & Health Review Comm'n, 861 F.2d 936, 940 (6th Cir. 1988); see also Cook v. Director, Workers' Compensation Programs, 816 F.2d 1182, 1187 (7th Cir. 1987) ("[C]lose cases of interpretation of an administrative regulation must be resolved in favor of the administrator's interpretation. . . ."); Brock v. Schwarz-Jordan, Inc., 777 F.2d 195, 198 (5th Cir. 1983) ("[B]ecause the secretary's interpretation is a reasonable interpretation and is entitled to great weight, it is dispositive
that a subordinate disagrees with the agency's choice should be irrelevant.

But, individual statements cannot be dismissed so easily. Even though agencies are free to exercise latitude in their interpretation and application of regulatory provisions, they do not have unbridled discretion. As Justice Scalia recently recognized: "[D]eference is not abdication, and it requires us to accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ." Courts can overturn regulatory interpretations for a variety of reasons, and they are

of this case."); Cranston v. Clark, 767 F.2d 1319, 1323 (9th Cir. 1985) ("Even if the agency's interpretation is not the only one permitted by the language of the regulation, where it is a reasonable interpretation, courts must respect it."); Marshall v. Whirlpool Corp., 593 F.2d 715, 721 (6th Cir. 1979) ("An administrative officer . . . may adopt regulations so long as they are reasonable and consistent with the intention of Congress as expressed by the statute."); aff'd, 445 U.S. 1, (1980).

An interpretation might, for example, be overturned if it conflicts with the language of the agency's governing statute, see United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985) (holding that the Army Corps' interpretation of "waters of the United States" could not conflict with the expressed intent of Congress); Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (holding that when Congress has explicitly addressed a particular issue, an agency may not differ from its desires); Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (holding that "quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes"), or its own regulations, see Stone v. Commissioner, 865 F.2d 342, 347 (D.C. Cir. 1989) (the court noted that the "Tax Court is of course free to make its own rules" regarding the scope of review to be applied to trial judges rulings. However, "until the court adopts new language, it must hew to the meaning of what it has said."); Fluor Constructors, 861 F.2d at 939 ("An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unless supported by the language of the regulation."); Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1328-29, 1331-32 (9th Cir. 1982) (concluding that agency was attempting to amend an informal rule by adjudicative interpretation and holding that agency had acted improperly); Bahat v. Sureck, 637 F.2d 1315, 1320-21 (9th Cir. 1981) (footnote omitted) ("[W]e question the authority of the BIA to amend the regulation by adjudication to include essentially the same provisions that were rejected by the Commissioner in promulgating the regulation. It is the Commissioner who is given the primary function of promulgating regulations. That authority should not be nullified by the adjudicatory arm of the INS."); United States v. Frontier Airlines, Inc., 563 F.2d 1008, 1011-13 (10th Cir. 1977) (The court believed that the FAA was acting inconsistently with its informal rule and concluded that the agency did not have the right to undertake such action adjudicatively.); see also Brennan v. Occupational Safety & Health Review Comm'n, 513 F.2d 713, 716 (8th Cir. 1975) ("If the Secretary desires by this regulation to achieve certain goals which he deems consistent with the purpose of the Occupational Safety and Health Act but which the wording of the regulation, as interpreted
often inclined to do so when an agency has applied its interpretations inconsistently. For example, in *North Haven Board of Education v. Bell*, the Supreme Court rejected an administrative interpretation. The agency had changed its interpretation of a regulation several times and had even changed it during the course of the judicial proceedings. The Court concluded that there was no interpretation to which to defer. Thus, courts can consider individual statements in determining whether the agency has acted consistently.

The validity of considering subordinate statements for this purpose might be questioned in light of more recent decisions. The courts have always recognized that agencies are free to alter their interpretations, provided they give a reasoned explanation for their change of position. In several recent cases, the Supreme Court has reaffirmed these basic principles. As the Court stated in *Rust v.

by the Commission, will not justify, he should amend or clarify it.

An interpretation might also be overturned if it conflicts with the regulation's purpose. See, e.g., *Fluor Constructors*, 861 F.2d at 941 (citation omitted) (The court rejected such an argument, noting that "the Commission's interpretation of the regulation better serves the remedial purposes of the Occupational Safety and Health Act.") The court noted further, "While the plain meaning of the regulation's words should not be strained to alleviate a safety hazard,. . . . we refuse to set aside a reasonable interpretation by the Commission which effectuates the Act's purpose of protecting the health of workers."); *Hart v. Bowen*, 799 F.2d 567, 570 (9th Cir. 1986) ("The Secretary's interpretation of the regulation as applied in this situation is unreasonable because it contravenes the purpose behind the Home Exclusion Rule."); *North Ga. Bldg. & Constr. Trades v. Goldschmidt*, 621 F.2d 697, 710-11 (5th Cir. 1980) (rejecting agency's interpretation based, in part, on the fact that it would "undermine" the purpose of the regulation); see also *Shoemaker v. Bowen*, 853 F.2d 858, 861 (11th Cir. 1988) (noting that the court "need not accept an agency's interpretation that frustrates the underlying congressional policy"); *New York State Dep't of Social Services v. Bowen*, 846 F.2d 129, 134 (2d Cir. 1988) (citation omitted) ("The deference ordinarily due the federal agency charged with interpreting a statute is unnecessary and inappropriate here where HHS's interpretation is not only inconsistent with the language of the Medicaid statute and its purpose,. . . but also in defiance of common sense.").

See, e.g., *Caiola v. Carroll*, 851 F.2d 395, 398-401 (D.C. Cir. 1988) (An agency treated individuals involved in a single transaction differently. Some were debarred from contracting with the government for a period of three years; one was not debarred. The court refused to defer, noting that it could find no basis for distinguishing between the individuals.).


See id.

See *Andrus v. Sierra Club*, 442 U.S. 347 (1979) (The Court considered an advisory guideline issued by the Council on Environmental Quality, interpreting the National Environmental Policy Act. That interpretation was issued because the President had ordered the Council to review its guidelines and transform them into mandatory regulations. During the review process, the agency changed its interpretation. Because the Council was able to
Sullivan, 214 "This Court has rejected the argument that an agency's interpretation 'is not entitled to deference because it represents a sharp break with prior interpretations' of the statute in question."215 The Court went on to state that "'[a]n initial agency interpretation is not instantly carved in stone.'"216 "An agency is not required to 'establish rules of conduct to last forever,'" but rather must be allowed to "'adapt [its] rules and policies to the demands of changing circumstances.'"217

Nevertheless, most courts will review agency changes in position more closely.218 By changing its position, the agency indicates uncertainty about the provision's meaning. Even though the agency may be able to justify its change of position, many courts will carefully scrutinize the agency's interpretation to see whether the later interpretation should be upheld. Moreover, in some cases, regulated entities mount "'retroactivity'" challenges. These challenges are possible because agencies usually seek to apply their interpretations retroactively.219 When an agency changes its inter-

justifying the second interpretation, the Supreme Court chose to accept it.); National Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472, 480-84 (1979) (accepting Tax Commissioner's evolving interpretation of the "business league" exemption as natural result of novel claims); see also General Am. Transp. Corp. v. ICC, 872 F.2d 1048, 1059-60 (D.C. Cir. 1989), cert. denied, 493 U.S. 1069 (1990) (accepting inconsistent interpretation of statute because reinterpretation was "permissible and rationally explained"); Jets Servs., Inc. v. Hoffman, 420 F. Supp. 1300, 1308 (M.D. Fla. 1976) ("An administrative agency is not bound to an interpretation or guideline when it becomes evident from experience that changes are required to keep pace with present conditions.") The court went on to observe that if the agency were required to adhere to its prior interpretation, "it would lose its necessary discretionary flexibility to act in its field of expertise, and would become burdened with fossilized errors.").


216 Rust, ___ U.S. at ___, 111 S. Ct. at 1769 (quoting Chevron, 467 U.S. at 863-64).

217 Id., 111 S. Ct. at 1769 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983)). The Court concluded "that the Secretary amply justified his change of interpretation with a 'reasoned analysis.'" Id. at ___, 111 S. Ct. at 1791 (quoting Motor Vehicles, 463 U.S. at 42); see also Bethenergy Mines, ___ U.S. at ___, 111 S. Ct. at 2534 (holding that the Department of Labor's changing interpretation was meant to incorporate advances in medical science as intended by Congress).

218 See, e.g., Donovan v. Adams Steel Erection, Inc., 766 F.2d 804, 807 (3d Cir. 1985) (citations omitted) ("It is settled that where an agency departs from established precedent without announcing a principled reason for such a reversal, its action is arbitrary . . . and an abuse of discretion . . ., and should be reversed.").

219 See, e.g., Pennzoil, 680 F.2d at 175 (Department of Energy applied definition of
pretation, litigants sometimes challenge the retroactivity, complain-
ing that the agency's interpretation was unanticipated, and that they were not given fair notice of, and an opportunity to comply with, legal requirements. They claim, therefore, that retroactive application would upset their settled expectations. In those instances when a retroactivity challenge succeeds, the court only allows the agency to apply its interpretation prospectively.


The central purpose of law is to guide behavior. When legislatures create rules, a person properly forms expectations about how the legal system will respond to his actions. Retroactive laws frustrate the central purpose of law by disrupting expectations and actions taken in reliance on them. This disruption is always costly and rarely defensible. Moreover, retroactive lawmaking violates what is often called the rule of law, namely, an entitlement of persons to guide their behavior by impartial rules that are publicly fixed in advance. This violation undermines human autonomy by hindering the ability of persons to form plans and carry them out with due regard for the rights of others.

See also Steven R. Munzer, Retroactive Law, 6 J. Legal Stud. 373, 391 (1977) ("[A] person is morally entitled to know in advance what legal character and consequences his acts have."); Norman J. Singer, Sutherland on Statutes and Statutory Construction § 41.02, at 340 (4th ed. 1986):

It is a fundamental principle of jurisprudence that retroactive application of new laws is usually unfair. There is general consensus among all people that notice or warning of the rule should be given in advance of the actions whose effects are to be judged.

21 See, e.g., Daughters of Miriam Ctr. for the Aged v. Mathews, 590 F.2d 1250, 1260 (3d Cir. 1978) ("[R]etroactive laws interfere with the legally-induced and settled expectations of private parties to a greater extent than do prospective enactments."); Adams Nursing Home, Inc. v. Mathews, 548 F.2d 1077, 1080 (1st Cir. 1977) ("[L]aws that unsettle settled rights can be harsh, and they deserve a special scrutiny."); Leedom v. International Bd. of Elec. Workers, Local 108, 278 F.2d 237, 240 (D.C. Cir. 1960) ("The vice inherent in retroactivity is, of course, that it tends to destroy predictability and to undercut reliance—both important aims of the law."); see also Norman J. Singer, Sutherland on Statutes and Statutory Construction § 41.02, at 340 (4th ed. 1986); Charles B. Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 692 (1960) ("Perhaps the most fundamental reason why retrospective legislation is suspect stems from the principle that a person should be able to plan his conduct with reasonable certainty. . . ."); Munzer, supra note 220, at 425:

One of the fundamental considerations of fairness recognized in every legal system is that settled expectations honestly arrived at with respect to substantial interests ought not to be defeated. There is evidence that results achieved through application of judicial instinct, manifested in the pattern of decisions on retroactivity problems, are perhaps best explained in terms of this fundamental principle of justice.

222 See, e.g., NLRB v. Bufco Corp., 899 F.2d 608, 611-12 (7th Cir. 1990); Stewart
In a number of cases, litigants have based their consistency and retroactivity challenges on individual statements. In some instances, current or former agency officials have been asked to testify regarding the consistency of the agency's position. In other cases, litigants have offered documents demonstrating that subordinate officials routinely applied a provision differently from the agency's current interpretation. Based on these documents, litigants have questioned whether the agency has consistently applied its current interpretation. United States v. Exxon Corp. provides a good illustration. In that case, the Department of Energy's regulatory scheme failed to address an important issue. The agency issued an interpretation resolving the issue and sought to apply its interpretation retroactively. The agency argued that Exxon should have known that the regulation would be interpreted in this way. Exxon disagreed and argued that the agency itself had been uncer-

Capital Corp. v. Andrus, 701 F.2d 846, 848-50 (10th Cir. 1983) ("[T]he IBLA abused its discretion by applying the Pack decisions retroactively."); Montgomery Ward, 691 F.2d at 1328 (agency may adjudicate so long as retroactive impact is not excessive or unwarranted); McDonald v. Watt, 653 F.2d 1035, 1042-46 (5th Cir. 1981) ("[A] reviewing court could require an agency to give a rule . . . prospective effect only."); Quincy Oil, Inc. v. Federal Energy Admin., 468 F. Supp. 383, 388 (D. Mass. 1979) (holding that DOE not allowed to apply agency ruling retroactively).

See, e.g., In re Department of Energy Stripper Well Exemption, 520 F. Supp. 1232, 1255 (D. Kan. 1981) ("The defendant's argument that only official interpretations should be examined is patently incorrect, and has been rejected by the Court on at least one prior occasion. . . . [The Temporary Emergency Court of Appeals] held that statements of lower level officials should not be disregarded. . . . [E]vidence of the interpretation given by lower level officials [is considered] only as it impact[s] on the consistency and contemporaneous construction issues."); rev'd on other grounds, 690 F.2d 1375 (Temp. Emer. Ct. App. 1982); Exxon Corp. v. Department of Energy, 91 F.R.D. 26 (N.D. Tex. 1981) (holding that the court must evaluate the evidence underlying the agency's final decision, including all relevant decision makers, not just final decision makers); United States v. Exxon Corp., 87 F.R.D. 624, 631 (D.D.C. 1980) ("The conclusion that this court can discern from Standard Oil is consequently amorphous but not without significance. TECA clearly recognized that, in certain circumstances, courts may look to lower level agency interpretations to decipher the agency's own understanding of its regulations.").


See, e.g., New York State Dep't of Social Serv. v. Bowen, 835 F.2d at 364-65 (showing use of memorandum to show inconsistency); Phillips Petroleum, 449 F. Supp. at 785 (involving use of instructional material, manuals, and a memorandum).

In United States v. Exxon, 87 F.R.D. at 631, the court made this point: "[I]n certain circumstances, courts may look to lower level agency interpretations to decipher the agency's own understanding of its regulations."

tain about the regulation’s meaning. Exxon claimed that agency
officials previously interpreted the regulation differently, and sought
discovery to prove its allegations.228

In a number of cases, courts have treated individual statements
as relevant. In Exxon, the court granted discovery of such state-
ments in an attempt to ascertain whether the agency’s interpretation
had been consistently followed.229 The court concluded that it could
“look to lower level agency interpretations to decipher the agency’s

228 See id. at 628-30.
229 The court stated:

Standard Oil, its district court precursors, Amoco Oil, and Gulf Oil, all
involve similar factual settings. In these cases, the original regulations were
either unclear or failed to address a particular situation. The DOE subsequently
released new regulations, which either clarified the prior ambiguity or deline-
ated a course of conduct not previously addressed.

Litigation arose in these cases when the DOE attempts, or indicates its
intention, to enforce the new regulations retrospectively. This necessitates
application of the subsequent, clarifying regulations, to a prior time period
during which the situation was unaddressed or ambiguous.

The oil companies seek contemporaneous construction materials in their
quest to justify their actions. They argue such materials may document that
the DOE regulations—before the subsequent clarifications—created a situation
of ambiguity. Evidence demonstrating that DOE officials interpreted the re-
gulations in various ways, or even perhaps construed them as sanctioning the
industry conduct, advances the industry defendants’ defenses.

This is exactly the situation in the instant case. The original CLC regu-
lations, released in 1973, failed to address whether a property unitization must
also aggregate its attendant BPCL's. The subsequent regulations, however,
required an aggregated BPCL for a unitized property. The DOE now attempts
to enforce the subsequent regulations retrospectively. It claims that Exxon
should have instituted a unitized BPCL as of June 1, 1975.

Exxon claims, however, that only on September 1, 1976, did it become
clear that a unitized property must also establish an aggregated BPCL. On
this date the DOE released its definition of significant alteration in producing
patterns. Accordingly, Exxon claims that its failure to unitize until September
1, 1976, was, under the circumstances, fully justified. It argues that the DOE
is retrospectively enforcing regulations; the enforcement allegedly applies to a
time period during which the original regulations were ambiguous and failed
to address the legitimacy of the conduct engaged in by Exxon.

The instant case, along with Standard Oil, Amoco Oil, and Gulf Oil,
teach [sic] a uniform lesson. Blinded deference to official agency interpretation
is unwarranted when the DOE attempts to enforce, retrospectively, new re-
gulations that clarify a situation unaddressed by the prior regulatory scheme.
In this situation, contemporaneous construction is valuable to the court. It
enables the court to determine whether those responsible for the enforcement
of the original regulations found them ambiguous. And it should also reveal
whether DOE employees interpreted the regulation in varying manners, perhaps
even as sanctioning the industry conduct.

Id. at 633.
own understanding of its regulations." In cases like Exxon, courts consider the views of low-level employees for a limited purpose. They are not concerned with whether the employee agrees with the agency's interpretation. Rather, they consider the employee's statements only to determine how agency officials applied regulatory provisions during the relevant time frame.

There is considerable disagreement among the courts about the desirability of using individual statements in this way. Courts agree that, except in rare cases, they will not reject an agency's interpretation based solely on the contrary view of a subordinate. In Pennzoil, for example, the plaintiff claimed to have relied on the advice of several agency officials regarding the meaning of regulations and argued that this advice diminished the degree of deference due the agency's interpretation. The court disagreed, noting that this advice was insufficiently authoritative.

Likewise,

230 Id. at 631.

231 Phillips Petroleum involved statements by low-level officials in the Federal Energy Administration (FEA). The court noted that there was "a dispute in this case . . . over what, if any, interpretation of the regulations the FEA adopted during the relevant period." DOE argued that it had adopted a particular interpretation, and it sought to dismiss statements by subordinates "as clearly erroneous and merely the unauthorized and unofficial views of several of the agency's auditors." The agency also argued "that only the agency's General Counsel and his staff had the authority to issue official interpretations of its regulations. . . ." Phillips Petroleum, 449 F. Supp. at 784. The court disagreed, noting that the agency did not officially interpret the regulations during the period in question, and that the auditor's views were evidence of the agency's understanding of the regulatory requirements. The court also noted that the understandings of these auditors were "highly relevant and material evidence of the general understanding of ambiguous regulatory provisions." Id. As a result, such statements were discoverable.

232 See Pennzoil, 680 F.2d at 166.

233 See id. at 171. Prior to the issuance of the interpretive ruling in question, the agency had issued five interpretations of the regulatory provision, none of which had been published. In each instance, the agency had acted consistently with its later ruling. Prior to the issuance of the last interpretive ruling, Pennzoil relied on informal advice in adopting a contrary interpretation of the regulatory term in question. Pennzoil claimed to have relied on "guidance from FEO [Federal Energy Office] officials in Houston, Texas, regarding the proper method of pricing crude oil from the Field after unitization." Id. at 166. The FEO was a predecessor agency of the DOE. Two communications are the "guidance" on which this claim was based. An intra-company memorandum makes reference to an "unidentified agency informant" that advised Pennzoil to take the position that it did. In addition, a letter from counsel refers to a conversation "with James Langdon, Esquire, Director of the Office of Regulatory Review of the Federal Energy Office." Id. at 166. Pennzoil claimed that this informal advice diminished the degree of deference due the agency's interpretive ruling. The court disagreed.

234 Id. at 171. The court stated, in full:

With further reference to Pennzoil's reliance upon informal advice as a diminishment of deference to be accorded to the agency's ruling, it is worth
in *Arizona Electric Power Cooperative v. FERC,* the court refused to give much weight to testimony by an agency’s staff member in hearings on an interim curtailment plan. The petitioner argued that it had relied on this testimony, and that the testimony could be used to undercut the agency’s differing interpretation. The court rejected both of these arguments. Other decisions are in accord.

Even when a number of subordinates have adopted a particular interpretation, so that it can be said to rise to the level of custom and practice, many courts are reluctant to consider such evidence. remembering that opinions are to be given little weight, as such, unless they are institutional in character.

*Id.* Of course, these statements might form the basis for a retroactivity challenge. See Russell L. Weaver, *Retroactive Regulatory Interpretations: An Analysis of Judicial Responses,* 61 Notre Dame L. Rev. 167 (1986).


237 See *id.* at 816 (noting that the testimony “was far removed from the type of specific guidance” required).

Another interesting decision is *Southern Goods Corp. v. Bowles,* 158 F.2d 587 (4th Cir. 1946). In that case, an assistant general counsel issued an interpretation for the benefit of attorneys administering the price control regulations. The court concluded that an interpretation issued by an attorney “is not entitled to the weight that the courts accord to an administrative interpretation evidenced by settled administrative practice.” *Id.* at 590. The court noted: “It would be absurd to hold that the courts must subordinate their judgment as to the meaning of a statute or regulation to the mere unsupported opinion of associate counsel in an administrative department.” *Id.* But the court deferred, noting: “Since . . . the interpretation in question received the sanction of the Administrator as an official interpretation, it is entitled to respectful consideration by us in interpreting the regulation . . . .” *Id.*

In some instances, courts rely on agency regulations in refusing to accord much weight to the positions of lower-level officials. For example, in *City of Gillette v. FERC,* 737 F.2d 883 (10th Cir. 1984), agency regulations authorized staff members to render opinions and advice but provided that those opinions would “not bind the Commission or any person delegated authority to act on its behalf.” *Id.* at 885.
Illustrative of this is the holding in *San Luis Obispo Mothers for Peace v. NRC.* There, the petitioners argued that the Nuclear Regulatory Commission’s construction of its own regulations was not entitled to deference because the agency had previously interpreted the regulation inconsistently. The prior inconsistent interpretations had all been rendered by agency staff. The court concluded that, despite the staff interpretations, the agency’s interpretation was entitled to deference. In *Kwan v. Donovan,* the court found the agency’s interpretation to be perfectly acceptable. However, previously, ALJs within the department had interpreted the regulation inconsistently. The court concluded that the ALJ interpretations did not undercut the justifications for deference.

There is, however, contrary authority. *Phillips Petroleum Co. v. Department of Energy* involved statements by low-level officials in the Federal Energy Administration (FEA). The FEA

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240 See *San Luis Obispo Mothers for Peace v. NRC,* 789 F.2d 26, 33 (D.C. Cir.) (“The Commission has never applied its regulation in any way except the way it did here. Indeed petitioners’ only support for their claim is apparently that the Commission’s staff has called for emergency plans to consider the potential complicating effects of earthquakes.”), *cert. denied,* 479 U.S. 923 (1986).

241 See *id.* (“The position of an agency’s staff, taken before the agency itself decided the point, does not invalidate the agency’s subsequent application and interpretation of its own regulations.”); see also *Parker v. Bowen,* 788 F.2d 1512, 1521 (1986) (The case involved the Department of HHS’s Appeals Council, which, on its own motion, decided to review an ALJ’s determinations. The Appeals Council reversed both determinations. The court concluded that the Appeals Council had the authority to review the determination.).

242 See *id.* at 784.

243 See *Parker v. Bowen,* 777 F.2d 479 (9th Cir. 1985). The court stated: The fact that administrative law judges within the Department of Labor may have employed inconsistent interpretations of business necessity prior to the promulgation of the Secretary’s interpretation is irrelevant. With the great deference we accord an agency’s interpretation of its own regulations, we must reject Kwan’s argument.


245 The court noted: There is a dispute in this case, however, over what, if any, interpretation of the regulations the FEA adopted during the relevant period. The plaintiffs cite numerous public statements by FEA personnel endorsing the proportional method and contend that the FEA construed the regulations in effect during the relevant period to permit use of that method. The FEA attempts to dismiss the pronouncements on which the plaintiffs rely as clearly erroneous and merely the unauthorized and unofficial views of several of the agency’s auditors.

Id. at 784.
sought to dismiss these statements as "unauthorized and unofficial views of several of the agency's auditors." The FEA argued that only the agency's General Counsel and his staff "had the authority to issue official interpretations of its regulations." The court disagreed, noting that the agency did not officially interpret the regulations during the period in question, and that the auditor's views were evidence of the agency's understanding of the regulatory requirements. The court held that the understandings of these auditors were "highly relevant and material evidence of the general understanding of ambiguous regulatory provisions." As a result, such statements were discoverable.

_United States v. Exxon_ obviously adopts a different approach than that taken in _San Luis Obispo_ and _Kwan_. That court was simply more willing to consider statements by subordinates. Which line of precedent is preferable? It is difficult to argue that statements by subordinates, to the extent that they rise to the level of custom and practice, should not be considered. In cases like

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246 Id.

247 Id.

248 Id.

249 Id.

250 The validity of such discovery is open to question. See _Contemporaneous Construction Discovery, supra_ note 204, at 381-88.

Even when discovery is granted, there will be limits on its scope. The court must balance the need for discovery against the burden imposed thereby. See _Exxon v. Department of Energy_, 91 F.R.D. at 42 (holding that "discovery can reasonably be tailored to minimize DOE's burden of search"); _United States v. Exxon_, 87 F.R.D. at 634 ("We believe that there is no hard and fast rule to guide a court in resolving the scope of relevant contemporaneous construction. Instead, a court must balance the potential relevance of the desired evidence, along with the likelihood of its existence, against the burden incurred by the agency in culling through its files."). Courts have placed various restrictions, limiting discovery to various time frames, see _Exxon v. Department of Energy_, 91 F.R.D. at 42 (limiting discovery to period from Aug. 6, 1973 to Oct. 2, 1978); _United States v. Exxon_, 87 F.R.D. at 635 (adopting cut off date of Sept. 1, 1976), and to documents prepared by certain types of officials. See _Contemporaneous Construction Discovery, supra_ note 204, at 381.

251 See _Phillips Petroleum_, 449 F. Supp. at 784: Statements by auditors and other officials of the agency . . . [have] value as evidence of contemporaneous construction. This is especially true here because the Court has assumed arguendo that the FEA did not officially interpret the regulations to require use of the proportional method, and therefore will examine the evidence of contemporaneous construction only to determine whether the FEA construed the regulations during the relevant period to require use of the NPCI Last method and whether the language of the regulations supports an interpretation which would permit use of the proportional method. Given the limited extent of the inquiry, it is clearly appropriate to resort to the experience and informed judgment of auditors, compliance
Exxon, when an agency announces its interpretation of a regulatory provision and asserts that the interpretation was one previously adopted, consideration of such statements may be particularly appropriate. But, evidence of positions taken by subordinates will rarely be readily available. As a result, when courts have been willing to consider such evidence, they have been met with broad requests for discovery.\textsuperscript{252} Litigants have often sought information regarding how subordinate officials, particularly those involved in compliance such as auditors and staff attorneys, applied regulatory provisions.\textsuperscript{253} During the early 1980s, there was considerable litigation against the DOE on this issue. This litigation presented many problems for the courts. One simply concluded that "this type of litigation just cannot be controlled under present circumstances."\textsuperscript{254}

Officials, staff attorneys and others within the FEA for guidance. Courts consider contemporaneous expressions of opinion by low-ranking officials highly relevant and material evidence of the general understanding of ambiguous regulatory provisions.

\textsuperscript{252} During the 1970s and 1980s, litigants used a form of discovery called "contemporaneous construction discovery" in an attempt to challenge regulatory interpretations. See, e.g., United States v. Exxon, 87 F.R.D. at 624 (holding oil company entitled to use "contemporaneous construction discovery" of DOE); Tenneco, 475 F. Supp. at 318 (holding oil company entitled to use "contemporaneous construction discovery" to complete administrative record); Gulf Oil, 465 F. Supp. at 918 (granting oil company order to depose two former FEA officials). For a discussion of this type of discovery, see Contemporaneous Construction Discovery, supra note 204.

This discovery took a number of different forms. In some cases, litigants hoped to demonstrate that an agency’s interpretation conflicted with its original intent. See Gulf Oil, 465 F. Supp. 913; Amoco, 29 Fed. R. Serv. 2d (Callaghan) at 404-05. Accordingly, litigants sought to depose those officials responsible for promulgating the regulations, see Gulf Oil, 465 F. Supp. at 916 (involving litigants that sought discovery of "agency officials responsible for...formulating the regulations"), and sought to obtain documents prepared during the promulgation process. See Amoco, 29 Fed. R. Serv. 2d (Callaghan) at 404-05 (extending discovery to pre-promulgation documents in attempt to find out what "the law was"). In other cases, litigants sought to discover how the agency interpreted the regulation immediately after it was issued, see Hydrocarbon Trading & Transp. Co. v. Exxon Corp., 89 F.R.D. 650, 655 (S.D.N.Y. 1981) (holding that discovery would be allowed, but only if Exxon could show its relevancy by demonstrating that the regulation was ambiguous); United States v. Exxon, 87 F.R.D. at 630-33 (holding that discovery during the relevant period was allowed); Tenneco, 475 F. Supp. at 318 (holding that discovery of all relevant materials was allowed), and at later points. See, e.g., United States v. Exxon, 87 F.R.D. at 630-33; see also Quincy Oil, 468 F. Supp. at 388 (allowing discovery over the entire relevant period). The goal in these cases was to demonstrate that the agency’s position had been inconsistent over time. See also Contemporaneous Construction Discovery, supra note 204, at 381.

\textsuperscript{253} See Phillips Petroleum, 449 F. Supp. at 784.

In a prior article, I discussed the propriety of this so-called "contemporaneous construction discovery." That article suggested that discovery is appropriate in some situations, but generally should be limited. An American Bar Association Administrative Law Section report goes even further. It suggests that this type of discovery has been severely curtailed by the federal courts and should not be permitted. Although the ABA may have overstated the situation, there is little question but that any discovery should be severely restricted. In many cases, discovery will be completely unnecessary. Litigants will be able to examine the agency's public statements and determine how the agency has interpreted a regulatory provision. Even when discovery is necessary, it can be limited. As the ABA Administrative Law Section suggests, broad discovery is rarely warranted.

**CONCLUSION**

Interpretive statements by individual agency employees have presented particular problems for the federal courts. The deference rule assumes the existence of authoritative administrative interpretations, but such interpretations do not always exist. In many instances, the only available interpretations have been rendered by subordinates. Still, courts are often asked to defer to such interpretations.

When an agency has failed to take a position on a regulatory issue, a reviewing court could refuse to defer. It would then be free to determine independently the meaning of a regulatory provision. But most courts are reluctant to ignore individual statements. The usual practice is to examine such statements to see whether they are reasonable, and whether they are sufficiently authoritative to qualify for deference. In some cases, courts find that the interpreting official has expertise, is exercising delegated authority, and therefore is entitled to deference.

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255 See *Contemporaneous Construction Discovery*, supra note 204.
256 Id. at 381-88.
257 The report stated:
This type of discovery has never been squarely approved at the appellate level. . . . Since *Pennzoil*, no reported cases have authorized "contemporaneous construction" discovery. Apparently courts have concluded, with some justification, that the low probative value of this type of evidence will rarely outweigh the burdens and delay involved in uncovering it.
258 See *Contemporaneous Construction Discovery*, supra note 204, at 383-88.
But, courts disagree about which statements qualify for deference. As the foregoing discussion suggests, few courts defer except when an individual statement is institutional in character. Unfortunately, it is not always easy to determine which interpretations have that quality. An analysis of recent cases suggests that courts are justified in treating certain individual statements as authoritative. Included are interpretive statements by the head of an agency, and those by subordinates that have been designated to make statements on the agency's behalf in litigation or before Congress. Deference might also be justified in other instances, such as when an ALJ has rendered an interpretation, or when an agency has taken an interpretive position in litigation. Ultimately, each case requires a careful assessment of the individual facts presented. There is little question that courts sometimes do defer, and are justified in deferring, to individual interpretations.