

## OPENING REMARKS

### CELEBRATING PROFESSOR PETER L. STRAUSS

*Robert A. Katzmann\**

Our understanding of administrative law owes much to Peter L. Strauss, Betts Professor of Law at Columbia Law School. To be asked to offer a few words at this Symposium in his honor is, for me, a privilege beyond measure. In thinking about his contributions and his effect on all of us in the field, I am drawn to what Peter Strauss, himself, once wrote about a judge for whom he clerked: “He the pebble, we the ripples on the pond.”<sup>1</sup> First, some attention to his biography, and then to the perspectives that have animated his brilliant work, and finally some words of personal appreciation.

A graduate of Harvard College and Yale Law School, Professor Strauss clerked for Judge David Bazelon of the District of Columbia Circuit and for Justice William Brennan, Jr. He lectured for two years on criminal law in the national university of Ethiopia, and spent three years as an attorney in the Office of the Solicitor General, briefing and arguing cases before the United States Supreme Court. In 1971, he joined the Columbia Law School faculty, where he has taught courses on administrative law, legal methods, and legislation. During 1975 to 1977, Professor Strauss was the first General Counsel of the United States Nuclear Regulatory Commission. His published works include *Administrative Justice in the United States*;<sup>2</sup> *Gellhorn & Byse’s Administrative Law: Cases and Comments* (most recently, 2011, with Rakoff, Farina, and Metzger);<sup>3</sup> *Legal Methods: Understanding and Using Cases and Statutes*;<sup>4</sup> *Legislation: Understanding and Using Statutes*;<sup>5</sup> *Administrative Law Stories*;<sup>6</sup> and a voluminous number of law review articles, concerned for the most part with subjects having to do with rulemaking, separation of powers,

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1. Judge David L. Bazelon Ctr. for Mental Health, History: Judge David L. Bazelon, <http://www.bazelon.org/Who-We-Are/History/Judge-David-L.-Bazelon.aspx> [http://perma.cc/FQS2-75E3] (last visited Sept. 2, 2015).

2. Peter L. Strauss, *Administrative Justice in the United States* (2d ed. 2002).

3. Peter L. Strauss et al., *Gellhorn & Byse’s Administrative Law: Cases and Comments* (11th ed. 2011).

4. Peter L. Strauss, *Legal Methods: Understanding and Using Cases and Statutes* (3d ed. 2014).

5. Peter L. Strauss, *Legislation: Understanding and Using Statutes* (2005).

6. *Administrative Law Stories* (Peter L. Strauss ed., 2006).

and statutory interpretation. In preparation for this Symposium, I asked our circuit reference librarian to compile Peter's articles—she produced three thick binders, with writings from 1972 to 2015.

Widely recognized for his academic contributions, Professor Strauss was awarded in 1987 the prize for distinguished scholarship in administrative law by the Section of Administrative Law and Regulatory Practice of the American Bar Association. He would later serve as Chair of the Section. In 2008, he was the recipient of the American Constitution Society's first Richard Cudahy prize for his essay *Overseer or "The Decider"? The President in Administrative Law*.<sup>7</sup> He has been reporter for rulemaking on its APA and European Union Administrative Law projects, and a member of its E-Rulemaking task force. Twice, Columbia Law School has turned to him to be Vice Dean. Professor Strauss has visited at universities here and abroad, and has lectured widely across the globe. A life member of the American Law Institute, in 2010 Professor Strauss was elected to the American Academy of Arts and Sciences.

Academia can be a place of narrow specialty. Not so for Professor Strauss. He manages to place whatever he is studying in the context of the institutions and networks that constitute the administrative state. An elegant quote from one of his writings well captures the canvass on which he has devoted his life's work:

Administrative law . . . is a protean subject. It engages legislature, executive, agency and court. It extends from regulation of subtle and often hazardous activities affecting health, to regulation of complex economic behavior, to regulation of the incidents of daily living. It uses adjudication and rulemaking in various forms, as well as the persuasive techniques of politics. It occurs at the national, state and local levels in widely varying degrees of formality, before an extraordinary kaleidoscope of institutions . . . . And where you sit—in the chairs of bureaucrat, protected citizen or regulated industry—can have a great deal of influence over where you will stand on many of its pervasive issues.<sup>8</sup>

It is this understanding of the actual workings of the administrative state, the product of study and real world experience, that fuels Professor Strauss's path-breaking insights into the administrative process, that spurs him to ask the important questions that need to be addressed. In that methodology, I cannot help but think that his mentor, the great Walter Gellhorn, would emphatically agree. For example, Professor Strauss's empirical appreciation of the administrative process led him to put

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7. Peter L. Strauss, Foreword: Overseer, or "The Decider"? The President in Administrative law, 75 *Geo. Wash. L. Rev.* 696 (2007).

8. Administrative Law Stories, *supra* note 6, at 1. I very much agree with that perspective as to how to try to make sense of the administrative state. See, e.g., Robert A. Katzmann, *Institutional Disability: The Saga of Transportation Policy for the Disabled 1–4* (1986) (analyzing issues attendant to transportation of disabled within similar analytical framework of kaleidoscope of institutional actors and processes).

forward the truth that agencies—not courts—are often the primary interpreter of statutes, that Congress legislates with agencies in mind.<sup>9</sup> That observation has all kinds of implications for how we should think about the interpretive dance of Congress, agencies, and courts. I found that insight most helpful as I thought about the role of legislative history in understanding statutory meaning in my own recent book, *Judging Statutes*.<sup>10</sup> It seemed to me instructive that if agencies make use of legislative history, as they do, so too courts might find authoritative preenactment legislative history useful as they construe statutes.<sup>11</sup> Thank you, Peter Strauss, for pointing the way.

And most certainly, Professor Strauss's knowledge of the actual workings of institutions leads him to tackle larger theoretical questions with authority, such as: What is the place of agencies in our government? Should the President be the overseer or the decider? What should be the role of courts in administrative law? What deference is owed to agencies? They are among the questions that inspire the distinguished participants in this Symposium to further examine: the impact of polarization and dysfunction (Gillian Metzger, Cynthia Farina, Abbe Gluck, Anne Joseph O'Connell, and Rosa Po);<sup>12</sup> the relationship between political control and expertise (Kevin Stack and Wendy Wagner);<sup>13</sup> and the role of the political branches, courts, and agencies (John Manning, Michael Herz and Thomas Merrill).<sup>14</sup>

Finally, on a personal note, I have very much appreciated Peter Strauss' professional collegueship over the years. At a Columbia Law School conference, here, when I was in my late twenties, I found myself in nervous awe as Peter Strauss and Walter Gellhorn were seated at my table. Each put me completely at ease and made me feel as if I had a place. Also early in my career, I well remember the lift Professor Strauss gave me when he wrote to ask if a piece I authored could be excerpted in the eighth

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9. See, e.g., Peter L. Strauss, When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History, 66 Chi.-Kent L. Rev. 321, 321–22, 339–40 (1990) (advancing paradigm shift in which “interpreters are executive officials [and] administrative agencies,” and arguing legislative history plays legitimate role in statutory interpretation).

10. Robert A. Katzmann, *Judging Statutes* 23–28 (2014).

11. *Id.* at 29–31.

12. Cynthia R. Farina, Congressional Polarization: Terminal Constitutional Dysfunction?, 115 Colum. L. Rev. 1683 (2015); Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, Unorthodox Lawmaking, Unorthodox Rulemaking, 115 Colum. L. Rev. 1789 (2015); Gillian E. Metzger, Agencies, Polarization, and the States, 115 Colum. L. Rev. 1739 (2015).

13. Kevin M. Stack, An Administrative Jurisprudence: The Rule of Law in the Administrative State, 115 Colum. L. Rev. 1985 (2015); Wendy Wagner, A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power, 115 Colum. L. Rev. 2019 (2015).

14. Michael Herz, Chevron Is Dead; Long Live Chevron, 115 Colum. L. Rev. 1867 (2015); John F. Manning, Inside Congress's Mind, 115 Colum. L. Rev. 1911 (2015); Thomas W. Merrill, Presidential Administration and the Traditions of American Law, 115 Colum. L. Rev. 1953 (2015).

edition of Gellhorn, Byse, Strauss, Rakoff and Schotland.<sup>15</sup> More recently, I have valued so much his interest in my own work on statutory interpretation.<sup>16</sup> My experience is not unique, as every Symposium participant and attendee can attest. At all times, I have been struck by his dedication to teaching, his caring for his students. His clerkship letters of recommendation are meaningful because he puts so much time into them, and, of course, because I have so much respect for his views.

With admiration, we celebrate Peter Strauss for all that he has contributed, knowing that he will continue to make important contributions in the years to come. I conclude, borrowing words he offered in tribute to Walter Gellhorn: "It appears that we need him still, that we need particularly the nonpartisan attention to facts on the ground and the realities of procedural operation that [has] so characterized . . . his life in administrative law."<sup>17</sup> To that I say: Amen.

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15. Robert Katzmann, Letter to the Editor, *Regulation Magazine*, Sept./Oct. 1982, at 4, 56, reprinted in Walter Gellhorn et al., *Administrative Law: Cases and Comments* 136–37 (8th ed. 1987) (critiquing congressional dominance theory and drawing upon my prior work in Robert Katzmann, *Regulatory Bureaucracy* (1980)).

16. Indeed, Peter Strauss co-authored a brief in the Supreme Court in support of a decision I wrote about in *Judging Statutes*; though the Supreme Court majority disagreed, I took some comfort in his argument. See Brief of Respondents, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (No. 05-18), 2006 WL 838890; Katzmann, *supra* note 10, at 81–90.

17. Peter Strauss, A Memorial to Walter Gelhorn, *Admin. & Reg. L. News*, Spring 1996, at 3, 11.