PETER L. STRAUSS, AN INTRODUCTION

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I first met Peter Strauss some thirty years ago when Clark Byse invited me to join in editing the casebook that Peter had already joined at the invitation of Walter Gellhorn. Since then we've slept in each other's houses, gone out to innumerable meals together, read drafts of each other's work, and, along with colleagues Cynthia Farina and Gillian Metzger—also participants in this Symposium—have continued to put out *Gellhorn and Byse's Administrative Law*.[1] We take our responsibilities to edit each other's chapters pretty seriously. Moreover, we have swapped chapters over the years, so I have line-by-line reworked chapters that Peter originally framed, as he has done on my prior work. Doing that you get to know another person's mind pretty well.

I have three general points I want to make about why I think Peter is such a fine scholar.

First of all, Peter thinks—and therefore writes—original thoughts. Consider, for example, his article from 1987 called *One Hundred Fifty Cases Per Year*.[2] This article asks what impact the Supreme Court's limited docket has on the doctrines the Court creates in an era when statutory law, and agency action pursuant to statutory law, has so dramatically grown.[3] Peter argues that the then recently decided *Chevron* case—which he calls an "otherwise surprising decision"—can be understood as a way for the Supreme Court to provide for a national uniformity in regulatory law.[4] Unable to provide enough nationwide interpretations on its own, the Court tells the regional players—the multiple courts of appeals—to defer to the other national players—the administrative agencies.[5] The point is sui generis. It is not in the least hinted at in the *Chevron* opinion itself. It is not based on the separation of powers, which is what everyone else talks about when they talk about *Chevron*. But with all the ups and downs of arguments about *Chevron* in ensuing years, Peter's explanation continues to be cited. Many would say it also continues to be the one explanation of *Chevron* that actually justifies the case.

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1. Peter L. Strauss et al., Gellhorn and Byse's Administrative Law: Cases and Comments (11th ed. 2011).

2. Peter L. Strauss, One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 Colum. L. Rev. 1093 (1987).

3. See id. at 1094 (identifying "Court's shrinking opportunity to contribute discipline, cohesion and control of the nation's law" as the article's "central problem of interest").

4. Id. at 1095.

5. Id. at 1121.

Second, I think a great strength of Peter's scholarship is his understanding of the inner workings of agencies. This of course stems from his own experience as General Counsel of the Nuclear Regulatory Commission. It is a well-recognized problem with much administrative law scholarship that it treats "the agency" as a black box. But there is also the risk, when that box is opened, that we view the people who work in agencies as automatons responding mechanically to institutional or personal incentives. The real virtue of much of Peter's work is that he not only opens the box, but that when he opens the box, what he sees is a collection of people who are self-conscious actors, that is to say, human beings. They are aware of their roles and of the legal, ethical, political, and customary tugs on those roles; not robots! So, says Peter in his award-winning article called *Overseer, or "The Decider"? The President in Administrative Law*,[6] it matters whether those who work in government understand their relationship to the President as one of "ordinary respect and political deference, on the one hand, [or] law-compelled obedience, on the other."[7] This sensibility also turns up in a path-breaking article that Peter wrote called *When the Judge Is Not the Primary Official with Responsibility to Read*.[8] This piece asks what the agency lawyer should do once *Chevron* is on the books.[9] To what extent does deference to the agency by the courts change the responsibility of the agency and its lawyers? Has the agency been given a new freedom to do just what it wants? Or does it have a responsibility to follow the law even beyond what the courts will demand of it? Peter argues for the latter, in part because in some respects agencies can understand the governing statutes better than courts do, and in part because we want agencies to maintain a rule-of-law culture.[10] One of my colleagues once said to me that the real goal is not to write the article that is the last word on a subject, but rather to write the article that is the first word. This article certainly meets that criterion; it has provoked a conversation among some of the greatest scholars in the field.[11]

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

7. Id. at 704.

8. 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 (1990).

9. Id. at 321–22.

10. See id. at 321–22, 351–53 (arguing in support of agencies employing legislative history while interpreting federal statutes, even if judiciary views such sources negatively).

11. See Jerry L. Mashaw, Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation, 57 Admin. L. Rev. 501, 501–04 (2005) (following and extending Strauss); Richard J. Pierce, Jr., How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss, 59 Admin. L. Rev. 197, 204–05 (2007) (disagreeing with Strauss and Mashaw); see also Jerry L. Mashaw, Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation, 59 Admin. L. Rev. 889, 895–903 (2007) (responding to Pierce).

Finally, even with all this creativity, I also want to praise Peter as a maintainer of a great tradition. Over the last couple of decades, judges have increasingly complained that in many fields the abstract theories of legal academics do not help the judges do their jobs. Administrative law, historically, thrived on the connection between what was going on in the academy, what was going on in the agencies, and what was going on in the courts. But it is not a tradition that is easy to maintain. Theory encourages separation from the day-to-day; the day-to-day in its turn encourages emphasis on pressing but temporary necessities. Peter's work over his entire career has consistently hit the sweet spot where theory and its application each gain from being brought into conjunction with the other. If, for example, you go back and look at Peter's great article that established the framework for his later scholarship—*The Place of Agencies in Government: Separation of Powers and the Fourth Branch*[12]—you will see that it is both a broad defense of a particular vision of administrative law and a discussion of several very important cases then recently decided. The theory helps us understand the cases; the cases help us understand the theory. This pattern has continued in Peter's work right to the present day.

This Symposium is in honor of Peter, and of the impact he has had on administrative law and scholarship. Our first set of writers, Gillian Metzger, Cynthia Farina, Abbe Gluck, Anne Joseph O'Connell, and Rosa Po[13] start us off with the question of how law is made in an era of partisan gridlock and a massive administrative apparatus. Does our institutional structure, writ large, produce a good mix of politics, law, and expertise, or does it produce a mess? Our second set, Kevin Stack and Wendy Wagner,[14] consider similar issues more from the perspective of asking: What makes a well-functioning agency? When should law, or politics, or expertise, control, and how do we arrange the institutional structures and relationships within which agencies work so that we get the appropriate result? And our last set, John Manning and Michael Herz, and Thomas Merrill[15] take us to the courts. How should courts handle statutes and executive actions in the age of administrative law and, inevitably, what should we

12. Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573 (1984).

13. 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).

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

15. 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)..

think about *Chevron*? Each of these participants has something to say as to how their topic connects with Peter's work. This is, in fact, easy to do, because his work covers the entire field of administrative law. He has both fashioned a general framework for the subject and has used it to look into almost every nook and cranny. And he continues to do so: The administrative-law blogs are full of his comments on recent developments.

A minute ago, I praised Peter for being an exemplar of a great tradition. So, I think, are the participants in this Symposium. They care about what is going on and they care about how it can be theoretically understood. This issue of the *Columbia Law Review* is a fitting tribute to what Peter Strauss has exemplified. You can hear a lot of sweet spots being hit!