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Under the ADA

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s you read this message, I’ll be nearing the end of my one-year term as Chair of the Section of Administrative Law and Regulatory Practice. My predecessors told me the year would fly by, and they were so right. I can hardly believe it’s over. Being chair is a big job—a very time-consuming and sometimes difficult job—and a truly wonderful job. It’s been a great privilege to be your chair. I am deeply honored and grateful that I was selected.

The first thing I’d like to do is to thank our staff. Kim Knight, you’re the greatest! Kim saved me from countless stumbles during my year as chair and her vast experience and great judgment was a tremendous asset. As many of you know, Kim is leaving us to become the staff director of the Dispute Resolution Section. All of us who worked with Kim know that we can always find a new director, but we can never replace her. I also want to thank Jenny Abreu, our staffer who concentrated on meeting planning. Our four council meetings went like clockwork due to Jenny’s superb work, and I’d like to think that each of you who attended one or more of those meetings had a great time.

I’d also like to thank so many other people who backed me up—Chair-Elect Russ Frisby, Vice-Chair Bill Luneburg, the many committee chairs and vice-chairs, my fellow council members, the wise old Section owls who helped me avoid the jams, and every single one of the volunteers who labored on our many projects and programs. There are too many to name here, but you know who you are and you have my heartfelt gratitude.

I want to single out for special thanks our two delegates to the ABA House of Delegates, Judy Kaleta and Tom Susman. Judy is retiring after two terms as delegate, and Tom has moved from private practice to become the ABA’s Director of Government Affairs. Serving as delegate is a huge responsibility, and our two delegates did a fantastic job. They won the respect of the entire House and ably carried the ball for us on numerous resolutions.

The least pleasant part of being chair was confronting our financial constraints. Unfortunately, we have been running at a deficit, and the deficit has been increasing. Among other financial limitations, we under-price our CLE programs as compared to other sections and we offer pricing discounts to government lawyers. Except for a few instances, we lack the lucrative sponsorships that some other ABA entities enjoy. And our selection of free member publications is second to none.

The Council has tried to confront the dilemma responsibly. Next year our dues will increase from $40 to $60, and we hope sincerely that our members will show their allegiance in the face of this increase. We will save considerable travel costs by holding our winter council meeting in Washington, DC, rather than in conjunction with the ABA’s winter meeting (although we will still offer CLE programs at the ABA’s midyear meeting). The Council also voted to further limit the amount that council members can be reimbursed for travel. Finally, the Annual Developments book has gone digital, and as a Section member you may access it online at www.abanet.org/adr.

This year, we were extremely active on the programmatic front. We presented or will present a number of resolutions to the House of Delegates. These include a resolution calling for states to adopt a redistricting commission (instead of redistricting by legislative action) and a resolution proposing a new model land use planning ordinance (to replace one that was written by Herbert Hoover and adopted in 1926). We also are sponsoring a resolution calling on Congress and the states to impose administrative procedures on congressionally-approved interstate compact agencies and to specify the standards for judicial review of such agencies’ actions. We sponsored a resolution calling for a pro bono program to assist the victims of identity theft. Additional resolutions that are well along in the pipeline relate to misuse of the congressional appropriations process and a call for the improvement of e-rulemaking and regulations.gov. We held smashingly successful Homeland Security and Rulemaking Institutes and numerous brownbag lunches and teleconferences. We’re working on our POTUS report, which will advise our new president, whoever he may be, on administrative law priorities.

During my year as chair, we committed ourselves to a higher profile on pro bono service. We launched a web page setting forth pro bono and internship opportunities in the area of administrative law and regulatory practice. I hope my successors will build on these efforts so that we will think of pro bono service as one of our Section responsibilities.

As you read this, our annual meeting in New York should be just around the corner. We have a wonderful set of informative CLE programs scheduled, which are itemized elsewhere in this issue of the News, and a terrific Section dinner with New York Corporations Counsel Michael Cardozo as the speaker. We’ll wrap up our European Union project with an all day program at Cardozo Law School that is a must-attend event for those of you who have an international practice. I wish each and every one of you well, and I leave the chair position knowing that the Section is in highly capable hands and that our Section will continue to be of service to all of our members.
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Administrative & Regulatory Law News

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The Administrative & Regulatory Law News welcomes a diversity of viewpoints. From time to time, the editors may publish articles on controversial issues. The views expressed in articles and other items appearing in this publication are those of the authors and do not necessarily represent the position of the American Bar Association, the Section of Administrative Law & Regulatory Practice, or the editors. The editors reserve the right to accept or reject manuscripts, and to suggest changes for the author’s approval, based on their editorial judgment.

Manuscripts should be e-mailed to: knightk@staff.abanet.org. Articles should generally be between 1500 and 2500 words and relate to current issues of importance in the field of administrative or regulatory law and/or policy. Correspondence and change of address should be sent to: ABA Section of Administrative Law & Regulatory Practice, 740 15th Street, NW, Washington, DC 20005–1002.

Nonmembers of the Section may subscribe to this publication for $28.00 per year or may obtain back issues for $7.00 per copy. To order, contact the ABA Service Center, 321 North Clark Street, Chicago, IL 60610, Tel. 800/285-2221.

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Nominations

Section Chair (automatic succession by operation of the bylaws):
H. Russell Frisby. Russell, currently Chair-Elect, is a partner at the law firm of Fleishman & Harding LLP. Before joining his current firm, Russell was a partner at Kirkpatrick Lockhart, served as President of CompTel/Ascent, a telecommunications trade association, and served as Chairman of the Maryland Public Service Commission. Russell is a former Section Budget Officer and he has served as the Section’s representative to the ABA Commission on Racial and Ethnic Diversity in the Profession.

Section Chair-Elect (automatic succession by operation of the bylaws):
William V. Luneberg. Bill, currently Vice Chair, is a Professor of Law at the University of Pittsburgh School of Law. His areas of specialization are: Administrative Law; Environmental Law; and Civil Litigation. Bill’s scholarship has been published widely in leading law journals. Bill’s longstanding involvement with the Section includes service on the Section’s Council, chairing the Legislative Process and Lobbying and the Rulemaking Committees, serving on the Nominating and Scholarship Committees, and most recently co-editing the third edition of Section’s Lobbying Manual book. In addition, Bill has played a leading role in developing several Section resolutions, and he has chaired and participated in many Section CLE programs.

Vice Chair:
Jonathan Rusch. Jon is Deputy Chief for Strategy and Policy in the Fraud Section of the Criminal Division at the U.S. Department of Justice. He has served as Section Secretary and a Council member, as well as chair or co-chair of the Antitrust and Trade Regulation, Criminal Process, and Regulatory Process Committees and as program chair for the Spring 2008 Section Meeting.

Last Retiring Chair (automatic succession by operation of the bylaws):
Michael Asimow. Michael, currently Section Chair, is a Professor of Law Emeritus at the University of California at Los Angeles and co-author of a leading textbook on administrative law. He is a former liaison to the Section’s Council for State Administrative Law and a former Council Member. He is the editor and a co-author of the Section’s A Guide to Federal Agency Adjudication, the drafter of the 2005 ABA resolution on adjudication, a past chair of the Adjudication Committee, and a co-reporter for the EU administrative law project.

Section Delegate:
Randolph J. May. Randy is President of The Free State Foundation, an independent, non-profit think tank. He is a past Chair of the Section and has chaired several of its committees. He is an adjunct professor of law at George Mason University School of Law, serves as a member of the Board of Visitors of Duke Law School, and has served as a Public Member of the Administrative Conference of the United States. He has written numerous columns on legal and regulatory affairs for Legal Times and the National Law Journal and published more than one hundred articles and essays on communications, administrative and constitutional law topics. In addition, he is the co-editor of two books, Net Neutrality or Net Neutering: Should Broadband Internet Services Be Regulated? and Communications Deregulation and FCC Reform.

Secretary:
Anna Williams Shavers. Anna is a professor of law at the University of Nebraska College of Law and holds the Hevelone Research Chair. She is a former council member and Immigration Committee chair and currently serves as chair of the Publications Committee and liaison to the ABA Commission on Immigration. She is a Board Member of the Midwestern People of Color Legal Scholarship Conference, Inc. She has previously served as Chair of the AALS Section on Immigration Law, a member of the ABA Commission on Law and Aging, and a member of the ABA Coordinating Committee on Immigration Law.

Budget Officer:
William Morrow. Bill has served as the Budget Officer for the past two years. He is the Executive Director and General Counsel of the Washington Metropolitan Area Transit Commission. He has served as Editor-in-Chief of the Administrative and Regulatory Law News for the past six years and currently co-chairs the Section’s Interstate Compacts Committee. He is an adviser to the National Center for Interstate Compacts and a former chair of the Section’s Transportation Committee.

Assistant Budget Officer:
Ronald Smith. Ron is Deputy General Counsel for Veterans Claims for the Disabled American Veterans. He supervises all appeals to the federal courts for the DAV. Prior to joining the DAV in February 1989, Mr. Smith worked in the Department of Veterans Affairs Office of Inspector General. Ron has authored a number of articles on veteran’s law topics and has continued on page 18.
The Rewriting of the Americans With Disabilities Act

By Michael Selmi*

The Americans With Disabilities Act ("ADA") provides a rich lens into the legislative process, whether in its formation or interpretation. Consider these basic facts: the ADA was passed in 1990 by overwhelming majorities in both houses of Congress with only token opposition from the business community. Yet, over the last fifteen years, a near unanimous Supreme Court has sharply restricted the reach of the ADA by narrowly defining the class of individuals that qualifies as disabled, and until recently, there had been no movement within Congress to alter any of the Supreme Court decisions.

This short article will trace the making, or some would say the unmaking, of the ADA and also explain how, and why, the Supreme Court rewrote the statute with Congress's implicit consent. Although the ADA was passed with overwhelming Congressional support, that support masked a broad indifference to the statutory language, particularly when it came to broadening the definition of disability as the statute purported to do. As a result, one important lesson behind the ADA is the importance of careful drafting with an eye towards eventual judicial interpretation, and with realistic expectations about how the Court is likely to approach its task.

The Making of the ADA

To understand the ADA, it is first necessary to discuss its predecessor statute the Rehabilitation Act ("Rehab Act"). The Rehab Act was passed in 1973 and prohibited discrimination against the handicapped, which was the term that was in use at the time, by the federal government, and most government contractors. When the statute was initially passed, it involved a vague definition of handicap, which was later amended to incorporate a peculiar definition drafted by Health, Education and Welfare. The agency defined handicap as “[A] ny person who (A) had a physical or mental impairment which substantially limits one or more of such person’s major life activities.” This definition is peculiar in that it is quintessentially legal in nature. Each term requires interpretation, and, the definition poses the possibility of a very broad concept of disability. Several years later, the Department issued a regulation that created a safe harbor list of conditions that automatically qualified as a disability, while leaving for judicial determination additional disabling conditions through the open-ended definition.

Litigation under the Rehab Act was always modest and the results were likewise mixed. Much of the litigation involved various procedural issues and those cases that sought to define the meaning of disability trod a fairly traditional path. Indeed, at the time, the primary question courts considered was whether mental health conditions qualified as a disability, with courts generally basing their decision on the seriousness of the condition.

When the ADA began to percolate in Congress in the 1980s, the Rehab Act thus provided a fairly limited model and one that might not prove so easily adaptable to a more comprehensive disability statute. Yet, the advocacy community quickly moved to borrow the Rehab Act's malleable definition of disability, in part because it already had the Congressional Seal of approval. Or so it appeared. The reality was far more complicated.

Both the Rehab Act and the ADA were pushed by a small group of legislators who had personal experience with disabilities. The House sponsor of the ADA was Tony Coelho who suffered from epilepsy and had experienced discrimination as a young man. In the Senate, a bipartisan coalition formed, including Bob Dole whose right arm was immobile, Tom Daschle whose brother was deaf, and Orrin Hatch whose brother-in-law suffered from polio. These, and many other legislators, added a personal commitment to the ADA, and their desire for comprehensive legislation was met by unequivocal support in both houses of Congress. Even the business community decided early in the process not to mount any significant opposition. As a result, the statute flew through Congress, even while the Civil Rights Act of 1990 drew a Presidential veto and the Civil Rights Act of 1991 stirred up substantial controversy.

Although the statute had an easy journey through Congress, it left many questions unanswered, or more accurately, it left many questions for judicial resolution, including the most critical question, who should qualify as disabled. Indeed, to the extent the statute generated any controversy, it was over the potential costs of accommodating disabilities in the workplace, whereas the definition of disability did not draw much attention. But this is where the problems began: the statute's advocates, particularly within the lobbying community, sought a broad definition of disability that would protect many who had what might be defined as non-traditional disabilities but for which there appeared to be no societal consensus for defining as disabled. Equally important, the ADA moved through Congress without a public debate, without a social movement to raise awareness of disability issues, and eschewed the administrative process in favor of immediate judicial resolution.

The ADA in the Supreme Court

Once the ADA passed, a surge of discrimination charges were filed with
the EEOC and cases began to flood the courts. Although many of these cases involved traditional disabilities, a surprising number were based on nontraditional claims. For example, some of the very first cases were filed by law students under the public accommodation section of the statute who were seeking additional time on the bar exam because they had bad memories. Other claims involved sensitivity to perfume and other allergies, along with various phobias, including a fear of snakes in a workplace where snakes were entirely absent. There were also a large number of claims by people who had medically controllable conditions, such as high blood pressure, as well as claims based on temporary disabilities suffered on the job or as the result of surgery. In many of these cases, the requested accommodation was an ability to work from home, or report to work late, and as one might imagine, courts were skeptical of most such requests. Indeed, the early success rate on disability cases was exceptionally low; by some estimates, as few as 5% of plaintiffs prevailed in court.

It was only a matter of time before the Supreme Court would begin to address some of the questions left open by the statute. The most significant case was *Sutton v. United Airlines*, 527 U.S. 471 (1999) a case that involved twin sisters who sought to fly commercial airplanes. Both sisters had severely restricted eyesight and failed to qualify under United’s requirement that individuals have uncorrected vision of 20-100. The sisters filed a lawsuit claiming their eyesight rendered them disabled.

The case posed an enormously important question under the ADA, namely whether mitigating measures, such as the eyeglasses or in other cases medication, should be taken into account when assessing whether an individual was disabled. At the same time, it is difficult to imagine a worse case to address that question, given that as many as 100 million individuals wear glasses a fact that was pointed out repeatedly at the oral argument and later in the Court’s opinion. True to form, the Court held, in a 7–2 decision, that in deciding whether someone was disabled under the ADA courts should take into account mitigating measures to determine whether the individual was substantially limited in a major life function. Someone who wears glasses, the Court added, is not so limited. I do not think anyone could plausibly claim that individuals who wear glasses were intended to be protected by the ADA. However, the Court’s decision has also made it difficult for individuals with serious medical conditions to qualify for coverage. This has been particularly true for individuals who suffer from epilepsy — as was true for the House Sponsor Tony Coelho — and also those who suffer from depression that can be treated medically. There was also some question, raised by the dissent in *Sutton*, whether individuals who have prosthetic limbs might be excluded from statutory coverage, although to date courts have found ways to protect those individuals.

The Supreme Court has taken up several other cases, including one involving high blood pressure that the Court rejected as a disability, but the most significant additional case came in the form of a workplace injury. In *Williams v. Toyota Motors*, 534 U.S. 184 (2002) the Court considered whether carpal tunnel syndrome that was acquired on an assembly line should be considered a disability. This was a critically important case given that workplace injuries are generally handled through workers’ compensation where carpal tunnel syndrome has proved controversial.

On the issue of whether workplace injuries should qualify as a disability, there was surprisingly little guidance available to the Court, even though this was an issue that was certain to arise and which could have been dealt with legislatively if Congress had paid more attention to the statute’s scope. Predictably, a unanimous Supreme Court found the individual was not disabled but it crafted a curious standard for making that determination, namely whether someone is substantially limited in a task that is “of central importance to most people’s lives.” This standard has led to some unusual inquiries, such as whether hugging is an activity of central importance, and it has also led to a further, and substantial, restriction on the statute’s scope.

Through its cases, the Supreme Court has clearly rewritten the statute to narrow the definition of disability and it has done so in a way that essentially tracks traditional disability categories. Both the Supreme Court and lower courts have been reasonably protective of traditional disabilities, and the Supreme Court specifically held that an individual who was HIV-positive but asymptomatic fell under the statute’s protection, even though one definition of being asymptomatic is that the person is not substantially limited in any life function. Quite clearly, what the Court has specifically rejected was the effort to expand the definition of disability beyond the traditional categories.

**The Lessons from the ADA’s Evolution**

Among commentators and disability advocates, the Supreme Court decisions have come in for rampant criticism. The main criticism has been that the Supreme Court’s interpretations have been inconsistent with legislative intent. There is some truth to this, but only some. The reality is that Congress had very little specific intent when it passed the ADA. It intended to prohibit discrimination among the disabled, while requiring reasonable accommodations for those who were disabled, but beyond that general intent, Congress seemed to have nothing particular in mind, including on the critical question of who should qualify as disabled. Despite the desires of the advocates, there is little reason to believe Congress intended to create a new and expansive definition of disability, or that it intended to supplement workers’ compensation or the existing social security disability schemes. The Supreme Court decisions have similarly tracked social norms in defining disability, exactly what one would expect from the Court, and quite likely what Congress expected. So even though the Court may have deviated from Congressional intent as expressed in the legislative history, it seems to have followed Congressional expectations by excluding non-traditional disabilities from the statute’s protective scope.

This is clearly not what the advocates had hoped for, nor what they hope to achieve with a new bill, which leaves continued on next page
the question of how a more expansive definition of disability might gain acceptance. Certainly if it were possible to craft very specific language, the Court would be more likely to respect the definition. But that assumes sufficiently restraining language is possible and it also assumes Congress desires a broad definition of disability. Rather than relying on more specific language, this might be an area that would be best pursued through an administrative process where an agency could develop principles and rules that were consistent with what Congress was trying to accomplish. Within employment discrimination law, administrative agencies have had a checkered history — the EEOC has generally been quite ineffective and does not engage in formal rulemaking. The other likely agency, the Department of Labor, has not fared much better, and most employment scholars are skeptical of the ability of either agency to play a strong or positive role in developing contentious statutory definitions.

If one cannot count on the courts, agencies or even Congress for an expansive definition of disability, we are left with changing social norms through political and social action. While the judicial process will occasionally get ahead of society on particular issues, it more commonly tracks social opinion. This has been true on many of the contested issues of the day, including most recently affirmative action where the Supreme Court’s opinions largely track public opinion, particularly elite public opinion. It has done the same on the disability law where there seems broad public support for protecting traditional disabilities and almost no public support for expanding the definition to include all manner of health conditions. Rather than relying on the legislative process, a broader definition of disability is more likely to come as a result of a public debate, something that has so far been missing from the legislative activity.
The definition of “disability” is among the most frequently litigated issues under the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-12213 (2000), because the statute protects only individuals with disabilities. The EEOC, acting pursuant to its statutory authority, has issued regulations with respect to Title I of the ADA, which protects individuals with disabilities from discrimination in the workplace. See 29 C.F.R., § 1630.2 (2007). The ADA defines a disability, in part, as an impairment that “substantially limits” a major life activity, 42 U.S.C. § 12102(2), and an EEOC regulation further defines the term “substantially limits” for purposes of Title I. 29 C.F.R. § 1630.2(j)(1) (2007).

Although the EEOC’s regulation is the product of a valid rulemaking process and is entitled to a high degree of deference under settled administrative law principles, the Supreme Court, in its 2002 decision in Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), sidestepped the regulation altogether. In Toyota, the Court both questioned the validity of the EEOC’s definition of “substantially limits” and applied the Court’s own, narrower, interpretation of that term in assessing whether an employee’s difficulty in performing manual tasks rendered her disabled and thus triggered the ADA’s protections. Since 2002, lower federal courts have similarly substituted Toyota’s stricter standard for the EEOC definition, even in cases involving activities other than the performance of manual tasks. These recent decisions represent a growing hurdle for ADA plaintiffs seeking to invoke the statute’s anti-discrimination protections.

The Supreme Court first questioned the validity of the EEOC regulations concerning the ADA’s disability definition in 1999. In Sutton v. United Airlines, 527 U.S. 471 (1999), Justice O’Connor noted that while the EEOC has authority to regulate with respect to Title I, the ADA’s disability definition appears in a separate “Definitions” section that precedes Title I. Although Title I provisions use the term “disability,” Justice O’Connor questioned whether the EEOC could issue regulations that elaborate on the statutory definition, given the placement of the definition in the statute. Specifically at issue in Sutton was the EEOC’s interpretation of the term “substantially limits,” which appears in the statutory disability definition. However, because the parties in Sutton agreed the EEOC definitional regulations were valid, the majority assumed their validity for purposes of the case before it and did not address “what level of deference, if any,” the definitional regulation was due. Three years later, in Toyota, the Court again in dicta noted the possible invalidity of the EEOC regulation interpreting the term “substantially limits” but again assumed its validity because neither party had raised the issue.

In Toyota, the Supreme Court addressed the proper standard for determining whether a person is substantially limited in the major life activity of performing manual tasks and thus disabled for ADA purposes. The plaintiff, Ella Williams, was an assembly line worker at a Toyota plant. Over time, she developed tendinitis and carpal tunnel syndrome. After some changes in her job duties, she suffered pain in her neck and shoulders and was diagnosed with myotendinitis and thoracic outlet compression, a condition that causes pain in the nerves that lead to the upper extremities. At that point, she asked Toyota to accommodate her by eliminating some specific tasks from her job. The record before the Court was unclear as to whether Toyota actually denied this request, or whether Ms. Williams simply began missing work at that point. At any rate, Ms. Williams’ physician eventually recommended that she not work at all because of her physical problems, and Toyota terminated her employment approximately seven weeks afterward.

Ms. Williams filed suit under the ADA, claiming that the termination and Toyota’s failure to accommodate her condition violated Title I’s anti-discrimination provision. The District Court for the Eastern District of Kentucky granted Toyota summary judgment, holding that Ms. Williams was not disabled and thus not entitled to the statute’s protections. The district court specifically held that Ms. Williams’s evidence fell short of showing a “substantial” limitation in any major life activity as a matter of law. The Sixth Circuit reversed that ruling and granted partial summary judgment to Ms. Williams, holding that her evidence showed she was substantially limited in the major life activity of performing manual tasks.

The Supreme Court disagreed with this analysis of the “substantially limits” element of the statutory disability definition. First, the Court recited the EEOC’s definition of “substantially limits,” which speaks in terms of a person being “[s]ignificantly restricted” in performing a major life activity with respect to “condition, manner, or duration.” The Court also noted that the EEOC regulations instruct courts to consider the impairment’s “nature and severity,” its “expected duration,” and its “permanent or long-term impact.”

Most significantly, however, when the Court turned to the assessment of whether Ms. Williams was substantially limited in manual tasks, it claimed that the EEOC regulations were “silent” as to the meaning of “substantial limitation” in that specific context. This claim, of continued on next page
course, conveniently sidestepped the fact that the regulatory definition of "substantially limits," which the Court had just recited, is meant to apply to all major life activities.

Nonetheless, having taken the EEOC regulations as silent on the issue of substantial limitations for purposes of the question before it, the Toyota Court noted that dictionaries equated "substantial" with "considerable" or "to a large degree." It therefore went on to interpret "substantial limitation" in terms of utter prevention or severe restriction. Because the Court also held that to qualify as major life activities, the "manual tasks in question must be central to daily life," it concluded overall that "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

In the end, the Toyota majority held that Ms. Williams would have to show that her impairments affected more than her performance of occupation-specific tasks in order to prove a disability. Thus, because the record indicated that Ms. Williams "could still brush her teeth, wash her face, bathe," and perform some other routine tasks, the Court held that the evidence failed to show "such severe restrictions in the activities that are of central importance to most people's daily lives."

On its face, the unanimous Toyota opinion leaves open the continuing question of the deference due the EEOC disability regulations. On a more insidious level, however, the Toyota opinion accords no deference at all to the "substantially limits" regulation. By taking the regulation as silent on the issue before it, the Court simply acted as if the regulation never existed. In doing so, the Court gave itself license to ignore applicable regulatory language and to substitute its own language to reflect the so-called plain meaning of statutory terms. For example, the Court recited EEOC language calling for analysis of "condition, manner, or duration" of the performance of a major life activity, but it never analyzed these aspects of Ms. Williams's performance of various manual tasks. Similarly, the Court recited EEOC language indicating that an impairment's "permanent or long-term impact" is one of several factors relevant to substantial limitation, but its opinion then morphed this factor into an absolute requirement, stating flatly that the "impairment's impact must . . . be permanent or long-term." Finally, the Court recited EEOC language equating substantial limitation with "[s]ignificant[]" restriction, but the justices somehow ratcheted this element upward to a "severe" restriction.

Conveniently, the Court never cited HEW guidance stating that an impairment need not be "severe, permanent, or progressive" to be substantially limiting for purposes of the Rehabilitation Act's identical disability definition. The express language of the ADA instructs courts to interpret that statute as broadly as HEW had interpreted the Rehabilitation Act, but the plain meaning of this bit of ADA text apparently did not interest the Toyota Court. Thus, the Court in Toyota implicitly decided to show no deference at all to a reasonable regulatory definition that had passed through the entire notice-and-comment process.

The Toyota court's disregard of the agency's disability "substantially limits" regulation has not gone unnoticed by the lower federal courts. Indeed, several federal circuits, relying on the Toyota court's apparent replacement of the EEOC's "condition, manner or duration" standard with the court's own dictionary-derived "severe restriction" standard, immediately viewed Toyota as creating a new "substantially limits" analysis. The Seventh Circuit, for example, was quick to observe in 2002 that Toyota had effectively enunciated a new definition of "substantially limits" and thereby "established a higher threshold for the statute than some had believed it contained."

Further, although Toyota by its own terms limited its scope to cases involving the major life activity of performing manual tasks, many lower federal courts have applied its more restrictive standard in cases involving other activities. The Eighth, Tenth, and Eleventh Circuits, for example, have used the "severely restricts" standard in cases where the plaintiff claimed to be substantially limited in the major life activity of caring for oneself. The Ninth Circuit has applied the standard in a case that turned on the major life activity of seeing, EEOC v. U.P.S., Inc., 306 F.3d 794 (9th Cir. 2002), and the Sixth Circuit has applied it to the major life activity of working, DePrisco v. Delta Air Lines, Inc., 90 Fed.Appx. 790 (6th Cir. 2004). Interestingly, the Seventh Circuit has applied the "severely restricts" standard in a case under the Rehabilitation Act, which contains an identical statutory definition of "disability;" the major life activity at issue in that case was walking.

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3 Didier v. Schwab Food Co., 465 F.3d 838 (8th Cir. 2006); Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762 (10th Cir. 2006); Greenberg v. BellSouth Telecommuns., Inc., 498 F.3d 1258 (11th Cir. 2007).
42 U.S.C. §12102(2)(C) (stating that a person “regarded as having [a substantially limiting] impairment” is disabled for purposes of the ADA).

Thus far, only the Third Circuit appears to have limited Toyota's standard to issues involving the performance of manual tasks, as a practical matter. Emory v. AstraZeneca, 401 F.3d 174 (3rd Cir. 2005) (applying the Toyota standard to plaintiff’s argument regarding manual tasks, but applying the EEOC regulation’s standard to plaintiff’s argument regarding the major life activity of learning).

Toyota’s questionable substitution of its own standard for the EEOC’s, and the spreading of this substitution by the lower courts, raises an already-high hurdle for ADA plaintiffs, who always have the burden of proving their disabled status as a threshold matter. In circuits that have not yet applied Toyota outside the “manual tasks” context, plaintiffs can still argue that the less strict EEOC standard should apply. In addition, in a narrow range of cases, some plaintiffs may find help in a provision extending coverage to those mistakenly perceived as disabled. Overall, however, the catching-on of the Toyota sidestep is a troublesome development for advocates for the disabled.

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18th Annual Margaret Brent Awards Luncheon - August 10th - New York, NY

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Title I of The ADA: What We Know and Don’t Know About Its Impact in the Workplace

Sharona Hoffman*

Analysis of cases decided under Title I of the Americans with Disabilities Act (ADA), which addresses employment discrimination, reveals that defendants have consistently prevailed in well over 90% of cases since the ADA’s inception. Based on this and other information, many commentators have concluded that the ADA’s Title I has failed to improve workplace conditions for individuals with disabilities. At the same time, statistics relating to resolutions achieved by the Equal Employment Opportunity Commission (EEOC), litigation settlements, and reasonable accommodations provided by private and public sector employers suggest that employers are reasonably responsive to Title I claimants and that the ADA has in fact improved workplace conditions for employees with disabilities. This article assesses what is known and unknown about the ADA’s impact in the workplace and argues that further empirical data must be developed in order to assess the law’s true effect.

The Bad News for ADA Plaintiffs and Individuals with Disabilities

It is clear that plaintiffs whose cases are resolved through court opinions very rarely prevail against employers. For example, a study conducted by the American Bar Association’s ABA Commission on Mental and Physical Disability Law in 2004 revealed that the plaintiff win rate in Title I cases was only 3%. The EEOC’s Associate Legal Counsel, Peggy Mastroianni, recently explained that the most significant hurdle for plaintiffs is the question of whether their impairments constitute disabilities that are covered by the ADA. To illustrate, in the 2007 case of Littleton v. Walmart Stores Inc., the Eighth Circuit ruled that a mentally retarded individual who was denied a job as a cart pusher was not sufficiently impaired to have a disability under the ADA. Many other courts have similarly ruled that a large number of conditions are not disabilities for statutory purposes.

Furthermore, employment rates for individuals with disabilities have not improved since the enactment of the ADA. A 2000 Harris Survey revealed that only 32% of adults with disabilities between the ages of 18 and 64 stated that they were employed, and many believe that a somewhat larger number of people with disabilities were employed in the pre-ADA era. The low employment rate may be explained in a variety of ways: 1) “disability” is a vague term, and respondents may be self-identifying as disabled in inconsistent ways, thus skewing survey results; 2) employers are reluctant to hire individuals with disabilities for fear that they will have to provide them with costly accommodations; 3) the unemployment rate is attributable to bias and misconceptions about those with disabilities; and perhaps most importantly, 4) public health benefits are available for the disabled unemployed, thus providing a disincentive for individuals with disabilities to try to enter the workforce, where they might obtain low-paying jobs that do not offer health insurance.

Evidence Suggesting that the ADA Has Had An Impact in the Workplace

While judicial outcome and employment rate figures paint a bleak picture for people with disabilities, other statistics suggest that the ADA has improved the work environment for disabled individuals who obtain employment.

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discrimination recovered considerably less.

In the context of litigation, settlement amounts usually are not disclosed to the public. However, the limited information that is available suggests that ADA plaintiffs do not fare poorly in the settlement arena. A study of nearly 500 employment discrimination cases resolved by Chicago magistrate judges in 1999–2005 showed that the mean settlement amount for ADA plaintiffs was $62,111. This mean exceeded the average settlement amounts recovered by litigants filing claims for alleged religious, national origin, sex, sexual harassment, and race discrimination (though the mean settlement for age discrimination plaintiffs was $74,069).

Most significantly, reports from employers concerning reasonable accommodations provided to workers reveal that many employers are generous and cooperative in accommodating the medical needs of their employees and do not need to be prodded by administrative charges or lawsuits. A study conducted by Suzanne Bruyere of Cornell University’s School of Industrial and Labor Relations found that over 80% of private sector employers asserted that they had made at least one of eleven listed accommodations. These include restructuring jobs/work hours, reassigning employees to vacant positions, modifying equipment, modifying training material, providing readers or interpreters, changing supervisory methods, providing transportation accommodations, providing written job instructions, making existing facilities accessible, implementing flexible HR policies, and modifying the work environment. Of federal employers, 93% represented that they had provided the last three of the listed accommodations. As many as 72% of respondents indicated that they never had a Title I claim filed against them, and thus, a significant majority of accommodations were furnished without judicial or administrative intervention.

Reports concerning ADA compliance by Minnesota and Maryland state agencies are similarly positive. The Minnesota agencies reported that during fiscal year 2005, they approved approximately 83% of requests for accommodation made by their employees and granted modified versions of requests in about 4% of cases. Maryland agencies indicated that they granted approximately 89% of accommodation requests submitted by their employees.

Employers may be eager to be responsive to employees’ requests for accommodation for a number of reasons. First, many employers are committed both to complying with the law and to behaving ethically towards their employees. In fact, in light of the statistics cited above, it is likely that employers are granting accommodations to some employees who would not be deemed by the courts to have disabilities if their cases were subject to judicial scrutiny, which has generally been quite harsh towards plaintiffs.

Second, litigation is costly and can be accompanied by negative media exposure, which employers are loath to risk. Many employee requests involve scheduling adjustments or other inexpensive changes that employers can accommodate with relative ease. One study found that nearly half of accommodations involved no monetary expenditure and, for the other half, the median cost during the first year was $500.

Third, employers may not wish to risk poor morale in the workplace, which could result from the perception that they are not responsive to the needs of sick or disabled employees. If an employer frequently denies requests for accommodation, and those denied share their disappointing experience with co-workers, general resentment might build, and the employer might be considered harsh and unreasonable, regardless of the legal merits of the requests.

The Need for Additional Data

It is commonly argued that Title I of the ADA has done little to improve workplace conditions for individuals with disabilities. The research that is briefly presented in this article questions this assumption. EEOC charge resolutions, settlement statistics, and reasonable accommodation reports all suggest that employees with disabilities are finding the workplace to be more hospitable and accommodating than it was in the pre-ADA era.

However, the available data sets are anemic in scope and number. Much more extensive information would be needed to measure the ADA’s impact accurately, and much could be gained from additional case outcome information and statistics. Further reports concerning how ADA claims have been resolved would allow employers to assess whether particular requests for accommodation are reasonable and employers to determine in more educated ways whether they should grant workers’ requests. The information would also enable parties to evaluate the monetary worth of their cases as they consider settlement options or decide whether to proceed to trial. Legislators, regulators, and other policy-makers would also find empirical data invaluable in determining whether the ADA and its regulations or, for that matter, any laws, are efficacious or require amendment.

Mandatory reporting requirements would be central to the expansion of claim resolution data. A variety of mechanisms could be used for this purpose. When courts retain jurisdiction to enforce settlement agreements, they could less frequently allow the parties to maintain confidentiality with respect to settlement terms. Settlement information could also be collected by the Bureau of Justice Statistics and compiled in publicly accessible reports. Further development of electronic databases containing court outcome summaries, such as PACER and Justia, would also be useful. Users should be able to launch regional and national searches using a variety of terms and criteria. Finally, the EEOC could require employers to report reasonable accommodation requests and their resolutions and publish the information in de-identified form.

Employment discrimination cases are often sensitive and emotional, and parties may well prefer to maintain secrecy concerning their details. Nevertheless, without sufficient case outcome information, it is difficult to assess the impact of Title I of the ADA and to make educated decisions concerning ADA litigation. The development of robust data sets concerning disability discrimination claims in the workplace is thus essential to both employers and employees who care about the integrity of the workplace.
Employment Discrimination Under Title II of the Americans with Disabilities Act

By Jamie L. Ireland & Richard Bales*

I. Introduction

Title I of the Americans with Disabilities Act of 1990 ("ADA") prohibits employment discrimination against disabled individuals. Title II prohibits discrimination by providers of public services. Title I contains several exclusions (federal employees, employees of small state agencies) and procedural requirements (filing a charge of discrimination before filing suit) that are not in Title II. If an employer is covered by Title II but not by Title I, may that employer be sued for disability discrimination in employment?

The Ninth Circuit has held in Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169 (9th Cir. 1999), that because Title I explicitly covers employment, and because Title II covers public services but does not specifically mention employment, Congress must have intended for Title II not to cover employment. This article, however, agrees with the circuits (4th, 5th, & 11th) that have held that Title II covers employment discrimination claims, for three reasons. First, the plain text of Title II broadly prohibits all discrimination by public entities. Second, the ADA’s legislative history indicates that Congress intended Title II to apply to employment discrimination. Third, the Department of Justice’s regulations interpreting Title II are on point and entitled to deference.

II. Background of the Americans with Disabilities Act

A. Introduction to the ADA

Congress enacted the ADA to prohibit discrimination against individuals with disabilities. The ADA contains two titles relevant to this article: Employment (Title I), and Public Services (Title II).

B. Title I of the ADA

Title I of the ADA covers employment, and provides that “[n]o qualified individual with a disability shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). It defines a covered employer as a “person engaged in an industry affecting commerce” with fifteen or more employees. The administrative agency in charge of implementing the Title and drafting suitable regulations is the Equal Employment Opportunity Commission.

Title I specifically exempts from its coverage: (i) Indian tribes, (ii) private sector employers with less than fifteen employees, (iii) private sector employees who have failed to timely file a charge with the EEOC, (iv) state and local agencies employing less than fifteen employees, (v) state and local government agency employees who have failed to timely file an EEOC charge, and (vi) federal employees. As discussed below, Title II does not contain exclusions (iv), (v), and (vi). Employees covered by these exclusions will find protection in the ADA only under Title II, if at all.

C. Title II of the ADA

Title II of the ADA, the “Public Services” title, provides that “no otherwise qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. This Title defines a covered “public entity” as a state or local government, department, agency, special purpose district, or other instrumentality of a state or states or local government.

The Attorney General is charged with implementing Title II and drafting suitable regulations. These regulations provide, in 28 C.F.R. § 35.140(a), that “[n]o qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.” These regulations explicitly prohibit employment discrimination under Title II. The regulations further specify that insofar as Section 504 of the Rehabilitation Act pertains to employment discrimination, the same prohibitions also apply to employment in “any service, program, or activity conducted by a public entity” in Title II, as long as the

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* Ms. Ireland is a student and Mr. Bales Professor of Law & Associate Dean of Faculty Development at Salmon P. Chase College of Law, Northern Kentucky University, respectively. This article is excerpted and summarized from 28 N. Ill. U. L. Rev. ___ (2008). 42 U.S.C. § 12111 et seq.
public entity is not also subject to the jurisdiction of Title I. Thus, according to the regulations, employment discrimination not covered by Title I is covered by Title II.

III. Circuit Split: Was Title II of the Americans with Disabilities Act of 1990 Intended to Prohibit Employment Discrimination?

Title I contains several exclusions (federal employees, employees of small state agencies) and procedural requirements (filing a charge of discrimination before filing suit) not found in Title II. The circuits are divided over whether employees not covered by Title I may sue for employment discrimination under Title II. Four circuits interpret Title II broadly to include employment discrimination claims. The Ninth Circuit, however, interprets Title II as prohibiting discrimination only in “outputs” provided by the public entity and not in “inputs” such as employment.

A. Extending Title II to Prohibit Employment Discrimination

The Second, Fourth, Fifth, and Eleventh circuits have extended Title II of the ADA to cover discrimination against disabled individuals in employment. An example is the Eleventh Circuit case of Bledsoe v. Palm Beach County Soil and Water Conservation District, 133 F.3d 816 (11th Cir. 1998). Mark Bledsoe believed that his employer, a local government agency, had refused to offer him an appropriate accommodation. He sued both the agency and the county under the ADA. The district court ruled that Bledsoe could not sue for employment discrimination under Title II of the ADA. When Bledsoe appealed, the Eleventh Circuit reversed, for three reasons.

First, the court focused on Title II’s statutory language. Section 12132 protects qualified individuals with a disability from being subjected to discrimination by “any such [public] entity.” This antidiscrimination provision, the court ruled, does not limit the ADA’s coverage to conduct that occurs in the programs, services, or activities, but is rather a “catch-all” phrase that prohibits all discrimination by a public entity.

Thus, according to the court, the express language of Title II prohibits employment discrimination.

Second, the court held that the legislative history was so “pervasive as to belie any contention” that Title II does not apply to employment actions. The court cited as an example the House Judiciary Committee Report stating that Title II would encompass discrimination prohibited by Titles I and III. The court also cited legislative history indicating that Congress intended Title II to work in the same way as Section 504 of the Rehabilitation Act. Because Section 504 focuses on employment discrimination, the court reasoned, Congress must have intended for Title II likewise to encompass employment discrimination claims.

Third, the court deferred to the Department of Justice’s regulations. These regulations, as described above, interpret Title II as covering employment discrimination claims.

B. Restricting Coverage of Employment Discrimination to Title I

Other courts, however, have ruled that Title II does not cover employment discrimination claims. An example is the Ninth Circuit decision of Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169 (9th Cir. 1999). Scot Zimmerman, a child support agent for the Department of Justice, had a visual impairment. He unsuccessfully requested an accommodation, then was fired. He sued under Titles I and II of the ADA. The district court dismissed his Title I claim because he had failed to file a timely charge with the EEOC. The district court dismissed his Title II claim because, the court found, Title II did not apply to employment discrimination claims.

The Ninth Circuit affirmed the district court’s dismissal of the Title II claim, for four reasons. First, the court examined the text of the statute. Title I, the court noted, contains a heading that explicitly refers to employment, and its language likewise explicitly pertains to employment. Title II, however, says nothing of employment. The court reasoned from this that Title I’s coverage of employment was intended to be exclusive. The court interpreted the broad language of Title II as applying only to “outputs” of a public agency, not to “inputs” such as employment.

Second, the Ninth Circuit gave the Attorney General’s regulations no deference, reasoning that the statute was clear on its face.

Third, the court reasoned that interpreting Title II to prohibit employment discrimination would make Title I unnecessary, and vitiate its procedural requirements. Moreover, because Title I and Title II delegate the responsibility of promulgating implementing regulations to different agencies, state and local governments could be subjected to conflicting regulations if both titles apply to employment disability discrimination.

Fourth, the court ruled that although Title II incorporates part of the Rehabilitation Act, it does so only with regard to procedural, not substantive, rights.

IV. Analysis

This article argues that Title II encompasses employment discrimination. This conclusion is compelled by (1) the plain language of Section 12132 of Title II, (2) legislative history, and (3) the Department of Justice’s implementing regulations.

A. The “plain” language of Title II

Many courts have divided Section 12132 phrase into two clauses. The first clause states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity.” This clause relates to activities of a public entity and does not exclude hiring or employing workers, for three reasons. First, putting people to work is the “chief activity” of municipalities. Second, Congress specified that Title II is to be interpreted in accordance with Section 794 of the Rehabilitation Act which defines “program or activity” as “all of the operations . . . of the governmental entity.” Third, in Consolidated Rail v. Darrone, 465 U.S. 624, 631–34 (1984), the Supreme Court interpreted the
Rehabilitation Act’s definitions of these terms to include employment.

The second clause of Section 12132 states: “no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity.” This clause on its face prohibits covered entities from engaging in any type of discrimination. As the Eleventh Circuit held in Bledsoe, “the language of Title II’s antidiscrimination provision does not limit the ADA’s coverage to conduct occurring in services, programs, or activities but is rather a “catch-all” phrase prohibiting “all discrimination by a public entity, regardless of the context.” 133 F.3d at 821 (emphasis added), (quoting Innovative Health Sys., Inc. v. White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997)). Thus, the second clause of Section 12132 of Title II prohibits employment discrimination.

B. Legislative History

As described above in Part III.A, the legislative history indicates that Congress intended for Title II to encompass discrimination employment discrimination even though Title I also covered employment discrimination. Moreover, the same legislative history indicates that Congress intended Title II’s reach to be similar to that of Section 504 of the Rehabilitation Act. Because Section 504 focuses on employment discrimination, Congress must have intended for Title II likewise to encompass employment discrimination claims.

C. Deference to the Attorney General’s Regulations

As described above, the text of Title II on its face encompasses employment discrimination claims. Because the Attorney General’s regulations for Title II are consistent with the statutory text, the regulations should be given deference. Alternatively, the employment focus of Title I, and the non-employment-focus but otherwise broad antidiscrimination language of Title II, creates ambiguity in whether Title II encompasses employment discrimination claims. If the statute is ambiguous, courts should defer to the administrative agency charged with drafting the regulations.

V. Conclusion

Title II of the ADA encompasses employment discrimination claims. This proposition is supported by the plain language of the statute, the expressed intent of Congress, and the Department of Justice’s implementing regulations. It also furthers the purpose of the ADA’s broad prohibition of discrimination, including employment discrimination, within Title II of the ADA.

From the ABA Section of Administrative Law and Regulatory Practice

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By James T. O’Reilly

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University of Miami President Donna Shalala served as President Clinton’s Secretary of Health and Human Services (HHS) from 1993–2001. She was the longest-serving HHS Secretary in history at a time when HHS’s budget approached $600 billion. Secretary Shalala previously served the Carter Administration as Assistant Secretary for Public Development and Research, Department of Housing and Urban Development — and, as an academic, as both Chancellor, University of Wisconsin, and President, Hunter College, City University of New York. In 2001 The Washington Post described Shalala as “one of the most successful government managers of modern times.”

In 2007 President George W. Bush chose Shalala and Senator Bob Dole to co-chair a new Commission on Care for Returning Wounded Warriors, giving them the mission to evaluate how to assist injured service members transition from active duty to civilian society. The President accepted the Commission’s recommendations; Congress has so far legislated to implement 90% of them.

At the University of Miami, President Shalala recently oversaw a successful $1.4 billion capital campaign — a first in Florida.

The first half of this interview, Donna Shalala on Presidential Transitions In Agencies, was published in the Spring 2008 issue of Administrative & Regulatory Law News.

MID-90’S GOVERNMENT SHUTDOWN

Drew — How did you handle the mid-90’s government shutdown? It must have been quite a management challenge in a Department as large as yours.

Shalala — It was really tough on our employees. It was the first time in their careers that they ever thought their civil servant jobs were threatened. So it really shook them up. We did a bunch of things. We communicated with all of our employees, and we made sure our middle-level managers were calling them. We could only keep essential employees working, and it was hard to make that kind of decision: who was, who wasn’t.

The best thing we did, though, was that we got our employees paid. In a discussion with my top staff, I pulled out my pay stub and asked whether we had to take out all the deductions — I think we only had half the money for their salaries before Christmas. It turned out we didn’t, so most of our employees got all of their salaries. And that was a huge help.

It made a big difference in terms of morale when the employees came back — and then, of course, we beat up the Republicans in the process. But we got a lot of work done during that period even with just the essential employees. We were really watching agencies to make sure checks were going out.

ABORTION

Drew — How did you handle the politics of the abortion issue during your years as Secretary?

Shalala — Carefully. The President and I both believed that abortions should be legal and rare. Certainly the partial birth stuff came out of the political side of the White House — not out of HHS.

Drew — It didn’t bubble up through the agency?

Shalala — No. The agency didn’t actually know anything about it. Most of the experts in the agency had never heard of it. There were a small number of people who were doing this procedure. It was not a broad-based standard of care that was being discussed. It simply got politicized.

Drew — What did you do then?

Shalala — Well, we had to testify. I found out about it when I was walking through the White House, and someone said, “Are you going to the press conference?” And I said, “What’s that about?” I called over to Public Health, and they didn’t know anything about it. I knew that we had set off a fire storm. I just could tell. The White House just assumed it was political and handled it. It became a mess. It’s been a mess for a long time. But, if it had come through the agency, we would have sent it to the American Medical Association (AMA). It’s an AMA issue, a standard of care issue that should not have been dealt with by the White House.

Drew — The President jumped in ahead of the agency on this?

Shalala — His staff did. They pulled him in ahead of the agencies. It’s a perfect example of where you can get into trouble by not checking things out. We

continued on next page
did handle RU-486, and it was our idea to have the company give the Population Council the license. The French drug company wanted to give it to the agency, and we said, No. So we did make those kinds of arrangements. We wanted to keep that at some distance from the President.

THE PRIVACY RULES

Drew — Near the end of the Clinton administration, you had another major political challenge in having to draft privacy rules when Congress suddenly didn’t, then punted that ball to you.

Shalala — Yes, we had the biggest administrative law challenge of a generation. We had been following the debate in Congress. We had some very good people. David Ellwood followed it early on before he went back to Harvard. One of his deputies, Gary Claxton, just stayed on it and watched the debate. But we never thought we were going to have to write the rules. We assumed that Congress was going to find the compromise and would act. Suddenly there we were a few months away from the eleventh hour, and Congress wasn’t going to do it.

So I turned around and asked do we have a draft. We didn’t have a draft. So we scammed to write and publish it, get comments from everybody, negotiate with the major constituencies, be careful about not favoring one versus another. The worst thing was that the research community could not agree on the rules. The National Institutes of Health (NIH) gave us one guidance and then another. The AMA changed its position at least twice.

Later, when the Republicans came in and were implementing the rules, they changed one thing because the AMA changed its position again. The AMA went back to its original position, and [then-HHS Secretary] Tommy Thompson asked me, Does that make you mad? I said no. The AMA just couldn’t make up its mind what it wanted us to do. But the fact is that those fundamental policies survived. We found the consensus. They were pretty well drafted. At the end of the day the rules were pretty straightforward.

RULEMAKING STRATEGIES

Drew — What was your strategy in drafting the privacy rules?

Shalala — We started with principles. Interestingly enough, we started like academics. We did not start by just drafting, figuring out what the rules were and just drafting. We started with a set of principles and with an underlying philosophy. The basic one was that health care information should be used for health care purposes. Then everything sprung from that. And we wrote ourselves an internal guidance memo on the framework for the rules.

We did this continually during the course of the administration. Most people think that you just sit down and take from some lobbyists and start drafting the rules. Well, some agencies might, but we never did that. We laid out the issues — then we debated them carefully.

Drew — That was your approach to rulemaking for HHS rules throughout your administration?

Shalala — Yes, we did it for Food and Drug Administration (FDA) Rules, for example. David Kessler would come in and say this is our underlying philosophy about these rules, or this is our guidance document.

Drew — Your starting point was usually internal agency guidance?

Shalala — Yes, then we would draft and fine-tune it constantly, going back to the principles we had agreed on.

Drew — In this drafting would you bring in the NGO’s [non-governmental organizations] — let whoever wanted in sit at the table?

Shalala — Yes, but we wouldn’t bring them to the table. We would bring them in individually or in groups to get their advice — their input. And we were very careful that we would balance the interests. So if we brought in these interest groups, we also had to bring in those — in terms of numbers and strengths and everything else. There was a lot of work that went into carefully doing that. I don’t think anyone ever did things as carefully as we did. We were squeaky clean. We didn’t get challenged.

Drew — Your rules generally survived?

Shalala — Our rules survived because we were so careful. We took a while to do them. We consulted Congress. We started with philosophy, with guidance, with previous law, because our intention was not to simply add something on top but to clarify. So there were long discussions about that, and, by the time they got to the drafting, they would have settled issues among themselves before they got to me.

Drew — What was your approach to regulatory negotiation vis-a-vis competing versions of different groups?

Shalala — Well, we reviewed competing versions. But what we did was get our draft out first. So the groups had to respond to our framework. And no one said, You’ve got the completely wrong framework. They were all working off our paper, which meant we were in control. So the groups sent us very detailed comments.

Administratively we ran our regs through the entire Department. We then had to run them through a very tough office at Office of Management and Budget (OMB) and sometimes the White House on controversial issues. But usually we could settle those with OMB.

We were very careful with the interest groups to make sure everybody played and that, even if groups didn’t have the resources, we would help them understand what we were doing.

Drew — How did you do that?

Shalala — We brought them in. Even if they weren’t in town, we made sure we talked to them on the phone. We always got balanced input, and we didn’t allow people to get to me directly, to influence me on regulations, so it was the process that was protected. It was fair.

You couldn’t get to the Secretary to shape a regulation.

Drew — And the more agencies you had involved on some of these rules, the more helpful this process was?

Shalala — Exactly, and all the agencies had to play in the rulemaking. Of course they had interest groups beating on them about the rules. But we kept control of the process. After that, of course we had to go through OMB and the regulatory people there, and that’s where we’d start to have some debate again.
ON THE PRIVACY RULES

HHS/JUSTICE DEBATE

Shalala — For example, we had an argument with the Justice Department about whether, if a law enforcement officer wanted to go through the records of a doctor, did he have to get a court order or an administrative order to be able to do that? I argued that we didn’t want a bunch of people looking for women’s abortion records in some areas in the United States, and the Justice Department argued that the law enforcement should be unfettered.

Drew — How did you resolve that debate?

Shalala — I lost that battle with Justice on the proposed rule. But I never gave up. Before we finalized the rule, I went back in and argued the issue again. In the meantime the Chief of Staff had changed. Since Justice, not OMB, was the problem, I had to go to the Chief of Staff. So I revisited the issue until I won it.

Drew — How did you finally win the issue?

Shalala — I rarely threatened to take issues to the President even when I thought I could win them with the President. But no one wanted me to take this one to the President — didn’t want to bother the President with it. So I enlisted the IG’s help, and the new Chief of Staff John Podesta agreed with us.

Drew — So HHS’s, not Justice’s, initial position made it into the final rule?

Shalala — Yes. All along I’d had the support of my own inspector general, who felt that she had to protect the doctor by, at a minimum, issuing some kind of an administrative order. She was perfectly fine with it. She did not agree that she should be able to go in unfettered and look at someone’s personnel records unless it was hot pursuit. None of us had any problem with a hot pursuit exception. That’s what Justice kept bringing up, and we kept saying no one has any problem with that — there is a long judicial history of hot pursuit and rights.

But we won it in the end. And the important thing was that this issue was being controlled at HHS not only by the policy people, but also by the general counsel’s office — our GC Harriet Rabb was not going to ever give it up.

FDA RULES

Drew — Certainly David Kessler had some controversial rules during your tenure. Did you work FDA rules any differently?

Shalala — Yes, but we worked them through. The FDA had tissue regulations and other things coming up. But the agency had a pretty narrow framework, and David always had an underlying set of principles — remember, we had an FDA commissioner who was both a doctor and a lawyer. So he wasn’t coming to the table with things that didn’t make any sense. And he had a pretty good staff working with him who worked closely with the general counsel’s office. What we did do was protect him from politicization. So we never talked to the White House about the FDA.

AVOIDING POLITICIZATION

Drew — How did you protect FDA from politicization?

Shalala — We didn’t have any political appointees other than the FDA commissioner over there — well, maybe one who did some scheduling. We basically kept the political appointees out of FDA. There must be a bunch of them now. But, other than David Kessler, we didn’t have political appointees at FDA.

Drew — Was this your policy at other agencies as well?

Shalala — Yes, at National Institutes of Health (NIH). We didn’t have political appointees handling NIH funding. We had one at NIH, but that was the legislative person who interfaced on politics. At Centers for Disease Control (CDC) there were political appointees, but the CDC Director and deputies weren’t really political. They were professional researchers. But we didn’t have a Schedule C down there. So we were extremely careful about protecting those agencies. There was none in the Public Health Service other than the assistant secretaries, and, although they were political appointees, they didn’t come out of the campaign. Our management and budget people had a very limited number of political appointees. The chief of staff’s office, the assistant secretary for legislation’s office, intergovernmental relations, and my own office — we had the political appointees. Basically we worked with the professionals in the Department and didn’t make distinctions.

POST-9/11 AGENCY REORGANIZATION

Drew — How do you see the work in your Department now having changed since the post-9/11 agency reorganizations?

Shalala — First of all the creation of the new Department [Homeland Security], I think, pulled a lot of things out [of HHS] that probably should not have been pulled out. I don’t think it was a very good idea.

I think it’s created some problems in the Department. But the main problem is that the [HHS] Secretary now doesn’t have that much emergency power.

Now the Departments are very much controlled by the White House. But we were in a partnership with the White House.

Drew — How did that work?

Shalala — Well, first of all we knew the people over there. We let them in orally on what we were up to. They knew our agenda was their agenda. We knew what the President’s positions were. We didn’t need an additional political overlay. They were colleagues. Some of them had worked for me. Some of them wanted to work for me, so they went back and forth. So there wasn’t a lot of tension. It was fun most of the time.

WALTER REED ARMY MEDICAL CENTER ASSIGNMENT

Drew — Now you’ve been University of Miami President for several years, and the next President of the United States recently reached out and called upon you and former Senator Dole to work on the crisis that had erupted regarding Walter Reed and the inadequate health care being given our returning veterans. How did that effort evolve?

Shalala — Well, you know if the President calls you up and says, “Your country needs you,” you do it. And I liked Senator Dole, I have an enormous respect for him. We had a very good time trying to figure out what to do. We made a limited number of recommendations, all of which were accepted by the President.
Council Members:

**Daniel Cohen:** Dan is the Assistant General Counsel for Legislation and Regulatory Law at the Department of Energy. Prior to joining the Energy Department, Dan was the first-ever Chief Counsel for Regulation at the Department of Commerce. Dan has authored several law review articles on the subject of Federal agency rulemaking, including *Congressional Review of Agency Regulations*, 49 Admin. L. Rev. 95 (1997). Additionally, he has been invited to speak on United States rulemaking procedure to a variety of groups, including lawyers and government officials from around the world. He has served as Chair of the Rulemaking Committee and as Section Budget Officer

**James Conrad:** Jamie is the principal of Conrad Law & Policy Counsel, where he represents businesses, associations and coalitions before agencies and Congress in the areas of homeland security; environment, health and safety; and science policy/information quality. He worked previously at the American Chemistry Council and two national law firms. He developed and edits the *Environmental Science Deskbook*, and his work has appeared in numerous law reviews and trade journals, as well as *The New Republic* and the *Washington Post*. He is the outgoing Secretary of the Section and co-chairs the Environmental & Natural Resources Regulation Committee. He has also held leadership positions in the Section of Environment, Energy & Natural Resources.

**Linda Lasley:** Linda currently serves as the Assistant Chief Counsel for the Legislation and Regulations Division in the Federal Transit Administration Chief Counsel's Office. Before taking that position in 2005, she was a senior attorney in the Office of Regulation and Enforcement, DOT Office of the General Counsel. Before moving to Washington, D.C. in May 2001, Linda served as an Environmental Law Judge for the Office of Environmental Adjudication in Indianapolis, Indiana, and as a Deputy Attorney General handling environmental litigation for the Indiana Attorney General's Office. Linda is the Chair of the Transportation Committee.

**Steve Vieux:** Steve is an attorney with the Federal Trade Commission's Bureau of Competition. He is a former chair of the Section’s Government Information and Right to Privacy Committee and was the program chair for the Spring 2005 Section meeting and co-chair for the Fall 2006 Section meeting. He has moderated numerous Section CLE panels and currently is a vice-chair of the Antitrust and Trade Regulation Committee and of the Publications Committee. His current term as a council member expires at the end of FY2008.

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2009 Nominations  continued from page 3

prosecuted more than 400 appeals in the federal courts, resulting in more than sixty published opinions. Ron has served on the Court of Appeals for Veterans Claims Rules Advisory Committee for many years and is a past chair of that committee. He has also been appointed to and presently serves on the Federal Circuit Advisory Council. Ron is a past President of the Federal Circuit Bar Association and a past Chair of the Federal Bar Association Veterans’ Law Section. He presently serves in the ABA House of Delegates and is a former council member of this Section.

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New Governance and Soft Law In Health Care Reform: A Response

By Christine M. Reed

Health Care Reform and Soft Law

Health care reform is undergoing major reform in the role of public agencies. In a recent article in Administrative & Regulatory Law News, Louise Trubek identified an emerging set of practices known as “new governance” characterized by devolution of government, public-private partnerships, new types of regulations and incentives, networks and active consumer involvement—all aimed at eliminating disparities in access to health care.1 The significance of managerial reforms for administrative law is the transformation of public law from “hard” uniform rules to “soft” guidelines and quality benchmarks without formal sanctions. She concluded that legal values based on constitutional and statutory law must be maintained but observed that the role of legal rights has been de-centered by these reforms.

The de-centering of legal rights is evident in the wake of the Olmstead2 decision. The Court identified placement in public institutions as a form of discrimination against people with developmental disabilities. This study examined 15 post-Olmstead lower federal court cases filed by plaintiffs whose complaints ranged from state restrictions on applications for home and community-based services; lengthy waiting lists for services; or restrictions on those services. (See table at end of article). State defendants provide services in the home and community by applying for waivers of “hard” Medicaid rules. Waivers give states discretion to limit the number of service slots, as well as the flexibility to design services geared to individual needs and circumstances.

The Effects of Soft Law on Access to Health Care

One of the most notable characteristics of the cases in Table 1 is the absence of liability determinations. Complaints alleged that lengthy waiting lists for waiver services and restrictions on services violated Medicaid Law and/or Title II of the ADA. Motions to dismiss in nine of the 15 cases were denied in all but one case; nevertheless only two of the 15 cases have proceeded to trial, while the others resulted in stipulated agreements to dismiss or court-approved settlements. State defendants agreed to increase the number of waiver slots, the scope of waiver services, and reduce the time frame for those who had already qualified for day services but needed residential services.

The role of judges in facilitating pre-trial settlements is difficult to determine from court documents; however, their role is clearly different from institutional reform law suits in the 1970s that included protracted trials and detailed remedial orders. Olmstead applied Title II of the ADA, but relied on state Medicaid waiver programs to increase access to health care and support services in home and community-based settings. Federal courts had limited power to enforce individual rights to home and community-based services, however, because waivers of Medicaid law and rules authorized states discretion to limit both the number and scope of waiver services. Judges instead used hearings on motions to dismiss ADA claims to reinforce the value of community integration.

The Texas judge denied the state’s motion to dismiss plaintiffs’ ADA claims, holding that the law created individually enforceable legal rights. In the Utah case the judge rejected the state’s argument that ADA claims may be pursued only by institutionalized persons. Olmstead also applied to individuals living at home waiting for services. In Illinois the Court of Appeals set aside the dismissal of ADA claims, referring the state to Olmstead finding that a comprehensive transition plan and a waiting list that moved at a reasonable pace would allow the state to avoid liability. Three courts (Maine, Nebraska and Utah) denied motions to dismiss ADA complaints on the basis of state sovereign immunity.

Rulings on pre-trial motions to dismiss ADA claims thus sent a powerful signal to states that more was at stake than the managerial values of efficiency, flexibility and consumer empowerment. Judicial values were also at stake, in particular the right of an individual with disabilities to live at home and in the community. The emphasis on family-centered care and patient self-management may have appealed to many parents who want to care for their children with special health care needs. States also supported waiver programs because of opportunities to reduce client dependency on Medicaid. Despite consensus on these administrative values, the potential exists for new governance and soft law reforms to overlook the potential threat to civil rights.

Conclusion and Implications

Pre-trial settlement agreements appear to reflect the willingness of state agencies as well as parents to work together to improve access and quality of home and community-based care. The 2005 Deficit Reduction Act creates opportunities for states to enlarge the scope of their waiver programs. Consensus on

continued on page 22
The Administrative Law and Regulatory Practice Section 2008 Annual Meeting will be held on August 7-10, 2008 in New York City. This year the Section has a number of activities scheduled for Thursday and we hope you will join us. On Thursday, the Section will commemorate our project on the study of Administrative Law of the European Union with a day-long program hosted by Cardozo Law School. The program will be video-taped for future use. Also on Thursday, the Section will host a free CLE program on special education issues as organized by the National Conference of Administrative Law Judges and co-sponsored by the New York City Bar Association’s Committee on Law and Education, the City University of New York, and the National Association of Administrative Law Judiciary Special Education Section. Lastly on Thursday, we invite you to join us for a free reception in honor of Roberta Karmel, a former Adlaw Section Council Member and 2008 Margaret Brent Award Winner.

On Friday, we will offer a variety of cutting-edge programs in the ABA’s Presidential CLE Center, and conclude the day with a reception and dinner at the University Club featuring Michael Cardozo, Corporation Counsel for the City of New York.

The host hotel for the Section is the Marriott Marquis Hotel, located in the heart of Times Square and the Broadway theater district. To register for the 2008 Annual Meeting and make hotel reservations visit the ABA website: http://www.abanet.org/annual/2008 we look forward to seeing you in New York City!

Thursday, August 7, 2008

<table>
<thead>
<tr>
<th>Time</th>
<th>Title</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>8:30 am – 5:30 pm</td>
<td>Conference on Administrative Law of the European Union</td>
<td>Benjamin N. Cardozo School of Law</td>
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<tr>
<td></td>
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<td>55 Fifth Avenue, 1st floor</td>
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<td></td>
<td></td>
<td>New York, NY</td>
</tr>
<tr>
<td>12:15 pm - 1:45 pm</td>
<td>Lunch – Gender Diversity: Not Just a Woman’s Issue Primary Sponsor: ABA Commission on Women in the Profession</td>
<td>Hilton New York</td>
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<tr>
<td></td>
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<td>West Ballroom, 3rd Floor</td>
</tr>
<tr>
<td>1:00 pm to 5:00 pm</td>
<td>Changing Times in Special Education Due Process: A View from the Bench on the State of the Law and Reconciling IDEA 2004 with No Child Left Behind</td>
<td>New York City Bar Association</td>
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<td>42 West 44th Street</td>
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<td>New York, NY</td>
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<tr>
<td>6:00 pm – 8:00 pm</td>
<td>Reception* in Honor of Roberta Karmel, 2008 Margaret Brent Award Recipient Sponsored by: Proskauer Rose LLP</td>
<td>Proskauer Rose LLP</td>
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<tr>
<td></td>
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<td>26th Fl, Conference Center</td>
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<tr>
<td></td>
<td></td>
<td>1585 Broadway</td>
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<td>New York, NY</td>
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</table>

Visit http://www.abanet.org/adminlaw for program descriptions. Questions? Contact Jenny Abreu at abreuaj@staff.abanet.org or 202-662-1582.
### Friday, August 8, 2008

<table>
<thead>
<tr>
<th>Time</th>
<th>Title</th>
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<tbody>
<tr>
<td>8:00 am - 5:00 pm</td>
<td>Section Information Desk</td>
<td>Sheraton New York Executive Conference Center Conference Room E</td>
</tr>
<tr>
<td>8:30 am - 10:00 am</td>
<td>A 10 Year Review of FDA’s Guidance Program: Successes and Opportunities for Improvement</td>
<td>Sheraton New York Executive Conference Center Conference Room F</td>
</tr>
<tr>
<td>8:30 am - 10:00 am</td>
<td>Patent Law Program - TBD</td>
<td>Sheraton New York Executive Conference Center Conference Room E</td>
</tr>
<tr>
<td>2:00 pm - 3:30 pm</td>
<td>Protecting New York City: View from the Federal, State and Local Law Enforcement Community</td>
<td>Sheraton New York Executive Conference Center Conference Room E</td>
</tr>
<tr>
<td>2:00 pm - 3:30 pm</td>
<td>Immigration Law and Federalism: How the Growth of State Laws Aimed at Immigration Regulation Interact with Federal Agencies</td>
<td>Sheraton New York Executive Conference Center Conference Room F</td>
</tr>
<tr>
<td>3:45 pm - 5:15 pm</td>
<td>Net Neutrality Regulation: Perspectives on What It Means and Whether It Is Necessary</td>
<td>Sheraton New York Executive Conference Center Conference Room F</td>
</tr>
<tr>
<td>3:45 pm - 5:15 pm</td>
<td>The Department of Treasury Blueprint for a Modernized Financial Regulatory Structure</td>
<td>Sheraton New York Executive Conference Center Conference Room E</td>
</tr>
<tr>
<td>6:30 pm - 9:30 pm</td>
<td><strong>Section Reception and Dinner</strong> Keynote Speaker: Michael Cardozo, Corporation Counsel, City of New York, NY</td>
<td>The University Club 1 W 54th Street New York, NY</td>
</tr>
<tr>
<td>10:00 pm</td>
<td>Chairman’s Hospitality</td>
<td>Marriott Marquis Chair’s Suite</td>
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### Saturday, August 9, 2008

<table>
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<th>Time</th>
<th>Title</th>
<th>Location</th>
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<tr>
<td>8:00 am - 9:00 am</td>
<td>Section Breakfast</td>
<td>Marriott Marquis Marquis Salon A, 9th Fl.</td>
</tr>
<tr>
<td>9:00 am - Noon</td>
<td>Section Council Meeting</td>
<td>Marriott Marquis Marquis Salons B/C, 9th Fl.</td>
</tr>
<tr>
<td>Noon - 1:30 pm</td>
<td>Publications Committee Meeting</td>
<td>Marriott Marquis Cantor, 9th Floor</td>
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<tr>
<td>2:00 pm - 3:30 pm</td>
<td>POTUS Project Meeting</td>
<td>Marriott Marquis Cantor, 9th Floor</td>
</tr>
<tr>
<td>10:00pm</td>
<td>Chairman’s Hospitality</td>
<td>Marriott Marquis Chair’s Suite</td>
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### Sunday, August 10, 2008

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<thead>
<tr>
<th>Time</th>
<th>Title</th>
<th>Location</th>
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<tr>
<td>8:00 am - 9:00 am</td>
<td>Section Breakfast</td>
<td>Marriott Marquis Marquis Salon A, 9th Fl.</td>
</tr>
<tr>
<td>9:00 am - Noon</td>
<td>Section Council Meeting and Annual Meeting of the Members</td>
<td>Marriott Marquis Marquis Salons B/C, 9th Fl.</td>
</tr>
<tr>
<td>12:15 pm - 2:00 pm</td>
<td>Executive Committee Meeting</td>
<td>Marriott Marquis Barrymore, 9th Fl.</td>
</tr>
</tbody>
</table>

*The Section Reception on Thursday, August 7 is **FREE**.

**Tickets for the Section Reception & Dinner on Friday, August 8 are being sold through the ABA for $90.
the policy objectives of family-centered care and patient self-management reflect the availability of nursing facility levels of health and support services to people with disabilities who want to remain in their homes. If states begin to impose limits on health and support services, however, individuals may be at risk of placement in nursing facilities. *Olmstead* will thus continue to play a key role in limiting the extent to which administrative reforms de-center the role of civil rights in reducing disparities in access to health care.

### Post-Olmstead Federal Law Suits: Medicaid Waiver Waiting List Cases

<table>
<thead>
<tr>
<th>State</th>
<th>Case</th>
<th>Pre-Trial Motions</th>
<th>Rulings on Motions</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Susan J. v. Riley</td>
<td>Move to dismiss</td>
<td>Denied</td>
<td>Trial Date</td>
</tr>
<tr>
<td>Alaska</td>
<td>Carpenter v. Alaska</td>
<td>N/A</td>
<td>N/A</td>
<td>Agreement/Dismiss</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Tessa G. v. AK DHS</td>
<td>N/A</td>
<td>N/A</td>
<td>Agreement/Dismiss</td>
</tr>
<tr>
<td>CT</td>
<td>Arc/CT v. O’Meara</td>
<td>Move to dismiss</td>
<td>N/A</td>
<td>Settlement</td>
</tr>
<tr>
<td>Delaware</td>
<td>Arc/DE v. Meconi</td>
<td>Move to dismiss</td>
<td>Denied</td>
<td>Settlement</td>
</tr>
<tr>
<td>Illinois</td>
<td>Bruggeman v. Blagojev</td>
<td>Move to dismiss</td>
<td>Denied*</td>
<td>Settlement</td>
</tr>
<tr>
<td>Maine</td>
<td>Rancourt v. ME DHS</td>
<td>Move to dismiss</td>
<td>Denied</td>
<td>Settlement</td>
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<tr>
<td>MA</td>
<td>Boulet v. Cellucci</td>
<td>Summary Judgment</td>
<td>For plaintiffs</td>
<td>Settlement</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Bill M. v. NE DHHS</td>
<td>Move to dismiss</td>
<td>Denied</td>
<td>Trial Date</td>
</tr>
<tr>
<td>Oregon</td>
<td>Staley v. Kulonoski</td>
<td>N/A</td>
<td>N/A</td>
<td>Settlement</td>
</tr>
<tr>
<td>TN</td>
<td>Brown v. TN DMHDD</td>
<td>Summary Judgment</td>
<td>Denied</td>
<td>Settlement</td>
</tr>
<tr>
<td>Texas</td>
<td>McCarthy v. Hawkins</td>
<td>Move to Dismiss</td>
<td>Denied (ADA)</td>
<td>Settlement</td>
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<tr>
<td>Utah</td>
<td>D.C. v. Williams</td>
<td>Move to dismiss</td>
<td>Denied (ADA)</td>
<td>Dismissal</td>
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<tr>
<td>VA</td>
<td>Quibuyen v. Allen</td>
<td>N/A</td>
<td>N/A</td>
<td>Agreement/Dismiss</td>
</tr>
<tr>
<td>WA</td>
<td>Arc/WA v. Quasim</td>
<td>Move to dismiss</td>
<td>Granted</td>
<td>Negotiations</td>
</tr>
</tbody>
</table>

* Court denied motion to dismiss but then dismissed the lawsuit: both Medicaid and ADA claims


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**From the ABA Section of Administrative Law and Regulatory Practice and the ABA Government and Public Sector Lawyers Division**


*By Jeffrey S. Lubbers*

This fourth edition brings the essential Guide to Federal Agency Rulemaking, formerly published by the Administrative Conference of the United States (ACUS), completely up to date. A concise but thorough resource, the Guide provides a time-saving reference for the latest case law, and the most recent legislation affecting rulemaking. This manual provides agency rulemakers, participants in rulemaking and judicial review, and private practitioners with valuable insights into how federal rules are made, with an integrated view of the procedural requirements. The new edition of *A Guide to Federal Agency Rulemaking*, written by Jeffrey S. Lubbers, former ACUS Research Director, retains the basic format of the previous editions while building upon the strong foundation established by ACUS in the previous editions. This fourth edition of The Guide, contains an index, and is organized into five parts: Part I is an overview of federal agency rulemaking and describes the major institutional “players” and historical development of rulemaking. Part II describes the statutory structure of rulemaking, including the relevant sections of the Administrative Procedure Act (APA). Part III contains a step-by-step description of the informal rulemaking process, from the preliminary considerations to the final rule, including a discussion of e-rulemaking. Part IV discusses judicial review of rulemaking with an expanded decision of the *Chevron* caselaw. Part V Appendices include key rulemaking documents. This is an indispensable guide for anyone developing or drafting federal agency rules. Order your copy today.

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By Robin Kundis Craig*

Chevron, Auer, Skidmore, and Ambiguous Agency Rules

The Supreme Court's complex deference jurisprudence with respect to agency interpretations of statutes played out fully in Federal Express Corp. v. Holoweksi, — U.S. —, 128 S. Ct. 1147 (Feb. 27, 2008). In this 7-2 decision by Justice Kennedy (Justices Thomas and Scalia dissented), the Court progressively applied Chevron, Auer, and Skidmore deference to determine what qualifies as a "charge" under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 et seq.

The ADEA, like most employment discrimination statutes, establishes primary enforcement authority in the Equal Employment Opportunity Commission (EEOC). When an employee files a "charge alleging unlawful discrimination" with the EEOC, that "charge" sets the Act's enforcement mechanisms in motion. 29 U.S.C. § 626(d). Specifically, if the EEOC does not act within 60 days of the "charge," the employee herself can file a lawsuit against the allegedly discriminating employer.

In Federal Express Corp., the employee submitted EEOC Form 283, an "Intake Questionnaire," together with an affidavit alleging that her employer, Federal Express, was discriminating on the basis of age. More than 60 days after submitting this form, the employee filed an ADEA lawsuit in federal court. Federal Express defended on the basis of age. More than 60 days after submitting this form, the employee filed an ADEA lawsuit in federal court. Federal Express defended on the basis that the submission of the Intake Questionnaire was not a "charge" and hence that the courts did not have jurisdiction over the lawsuit.

The ADEA does not define "charge." However, the EEOC had issued regulations for the ADEA, three of which bear on the issue of what counts as a "charge." First, the EEOC's regulations state that "[c]harge shall mean a statement filed with the Commission by or on behalf of an aggrieved person which alleges that the named prospective defendant has engaged or is about to engage in actions in violation of the Act." 29 C.F.R. § 1626.3 (2007). A later regulation specifies five pieces of information that should be included in the charge but also states that the charge is sufficient if it meets the requirements of Section 1626.6. 29 C.F.R. § 1626.8(a), (b). Section 1626.6, in turn, states that a "charge" is sufficient if it is in writing, provides the name of the respondent, and generally alleges discriminatory acts.

From these regulations, three arguments arose regarding the Intake Questionnaire at issue. Respondent Federal Express argued that the Intake Questionnaire could never serve as a "charge." The plaintiff employee, arguing the view of the Ninth Circuit, argued that an Intake Questionnaire always qualified as a "charge." The EEOC, participating through the United States' amicus brief, argued in concert with the Second Circuit that an Intake Questionnaire can serve as a "charge" if it expresses the filer's intent to activate the EEOC enforcement mechanisms.

Against this three-way interpretive argument, the Court began its process of defining "charge" by according Chevron deference to the EEOC's legislative rules, so far as they went:

The Act does not define charge. While EEOC regulations give some content to the term, they fall short of a comprehensive definition. The agency has statutory authority to issues regulations, see § 628; and when an agency invokes its authority to issue regulations, which then interpret ambiguous statutory terms, the courts defer to its reasonable interpretations. The regulations the agency has adopted — so far as they go — are reasonable constructions of the term charge. There is little dispute about this. The issue is the guidance the regulations give.

128 S. Ct. at 1154. However, the regulations were clearly ambiguous regarding whether every Intake Questionnaire that met the minimal requirements of Section 1626.6 should qualify as a "charge."

Given the ambiguity of the regulation, the EEOC claimed Auer deference for its interpretation of the regulation. Moreover, as for the basic issue of whether everything that meets Section 1626.6 qualifies as a charge, the Supreme Court granted Auer deference, meaning that it would reject the EEOC's interpretation only if were "plainly erroneous or inconsistent with the regulation." Id. at 1155 (citing Auer v. Robbins, 519 U.S. 452, 461 (1997)).

However, the EEOC wanted more:

The EEOC submits that the proper test for whether a filing is a charge is whether the filing, taken as a whole, should be construed as a request by the employee for the agency to take whatever action is necessary to vindicate her rights. . . . The EEOC has adopted this position in the Government's amicus briefs and in various internal directives it has issued to its field offices over the years. . . . The Government asserts that this request-to-act requirement is a reasonable extrapolation of the agency's regulation and that, as a result, the agency's position is dispositive under Auer.

Id. at 1155–56. The Court, however, concluded that Skidmore deference was the appropriate level of deference to give:

The Government acknowledges the regulations do not, on their face, speak to the filer's intent. To the extent that the request-to-act requirement can be derived from the text of the regulations, it must spring from the term charge. But, in this context, the term charge is not a construct of the agency's regulations. It is a term Congress used in the underlying statute that has been incorporated into the regulations by the agency. Thus, insofar as they speak to the filer's intent, the regulations do so by repeating language from the continued on next page
underlying statute. It could be argued, then, that this case can be distinguished from Auer . . .

... In our view the agency's policy statements, embodied in its compliance manual and internal directives, interpret not only the regulations but also the statute itself. Assuming these interpretive statements are not entitled to full Skidmore deference, they do reflect “a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” As such, they are entitled to a “measure of respect” under the less deferential Skidmore standard. Id. at 1156 (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998) (quoting Skidmore v. Swift & Co., 323 U.S. 134 (1944))), (citing Alaska Dept. of Environmental Conservation v. EPA, 540 U.S. 461, 488 (2004); United States v. Mead Corp., 533 U.S. 218, 227-39 (2001)).

Applying Skidmore deference, the Court emphasized “whether the agency has applied its position with consistency.” Id. In this case, the Court noted that the EEOC’s interpretation had been binding on the EEOC staff for five years. Moreover, although application of the EEOC’s interpretation had been inconsistent across offices and cases, “[t]hese undoubted deficiencies in the agency’s administration of the statute and its regulatory scheme are not enough . . . to deprive the agency of all judicial deference. Some degree of inconsistent treatment is unavoidable when the agency processes over 175,000 inquiries a year.” Id. at 1156-57. In addition, the EEOC’s interpretation was consistent with the agency’s previous directives, and there was no evidence that the agency was adopting that interpretation merely as a litigation position.

The Court also emphasized the EEOC’s role under the ADEA. Specifically, the EEOC functions both as the enforcement agency and as the public education agency. As such, the agency had to have some way of sorting its education and enforcement functions in response to filings from the public. Id. at 1157. As a result, the plaintiff employee’s position regarding the breadth of Section 1626.6 “is in considerable tension with the structure and purposes of the ADEA. The agency’s interpretive position — the request-to-act requirement — provides a reasonable alternative that is consistent with the statutory framework. No clearer alternatives are within our authority or expertise to adopt; and so deference to the agency is appropriate under Skidmore,” Id. at 1158.

Having thus arrived at an interpretation of “charge,” the Court also clarified that the EEOC does not have to act on a filing to make it a charge. Id. at 1158-59. As a result, the Court agreed with the EEOC that the plaintiff had filed a “charge,” in large part because “[t]he agency’s determination is a reasonable exercise of its authority to apply its own regulations and procedures in the course of the routine administration of the statute it enforces.” Id. at 1159.

Justice Thomas dissented, joined by Justice Scalia. According to the dissenters, “[t]oday the Court decides that a ‘charge’ of age discrimination under the Age Discrimination in Employment Act of 1967 (ADEA) is whatever the Equal Employment Opportunity Commission (EEOC) says it is . . . Because the standard the Court applies is broader than the ordinary meaning of ‘charge,’ and because it is so malleable that it effectively absolves the EEOC of its obligation to administer the ADEA according to discernible standards, I respectfully dissent.” Id. at 1161.

Notably, the dissenters would have begun the analysis not with the proper level of deference but instead with the Court’s own analysis of the plain meaning of “charge.” Moreover, because they concluded that this plain meaning — accusation or indictment — included a requirement of a formal charge against the respondent, they would have denied the EEOC all deference, even under Chevron. Id. at 1163.

Agencies and Federal Preemption

In February, the Court decided three preemption cases, three of which touch on the role of agencies. Preston v. Ferrer, --- U.S. ----, 128 S. Ct. 978 (Feb. 20, 2008), involved the relationship between the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et seq., and state agencies. Specifically, the California Talent Agencies Act, Cal Labor Code Ann. §§ 1700 et seq., lodges the initial dispute resolution authority for conflicts arising under the Act in the California Labor Commission (CLC). In June 2005, Preston demand arbitration of his TV show-related contract with Ferrer in accordance with the arbitration clause of that contract. A month later, Ferrer petitioned the CLC, arguing that the contract was invalid and unenforceable under the California Talent Agency Act because Preston had acted as a talent agent without the appropriate state license.

The issue was therefore whether Section 2 of the FAA, which makes arbitration clauses enforceable despite state law, required the issue of the contract’s validity to be heard before the arbitrator, or whether the courts should respect California’s assignment of that task to the CLC. The Court, in an 8-1 opinion by Justice Ginsburg (Justice Thomas dissented), had no difficulty finding that the FAA preempted state law. According to the Court, “when parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.” Id. at 981 (emphasis added); see also id. at 987 (repeating the same conclusion). The Court emphasized that, under its previous FAA jurisprudence, “attacks on the validity of the entire contract, as distinct from attacks aimed at the arbitration clause, are within the arbitrator’s ken.” Id. at 984 (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)).

Ferrer tried to differentiate the administrative proceeding from court proceedings by arguing that the California statute merely required parties to exhaust their administrative remedies before proceeding to arbitration. The Court, however, was
D.C. and 9th Circuits Consider FOIA Exemption 6 — Personal Privacy.

In Multi AG Media LLC v. Department of Agriculture, 515 F.3d 1224 (D.C. Cir. 2008), and Forest Service Employees for Environmental Ethics v. United States Forest Service, 2008 WL 1902511, (9th Cir. 2008), the D.C. and Ninth Circuits addressed the scope of the FOIA exemption for “personnel and medical and similar files,” Exemption 6. In Multi AG Media, the D.C. Circuit split on the question of whether various USDA data on small farm operations was exempt, the majority deciding that the information could qualify for the exemption because it could be traced to individuals, but that given the public interest in the information, the invasion of privacy was not “clearly warranted.” Dissenting, Judge Sentelle would have placed a much higher premium on individual financial privacy.

In Forest Service Employees, the Ninth Circuit applied the exemption to a request for the identities of Forest Service personnel called to fight a fire in which two of their number had died. Despite criminal charges against the team leader and the inadvertent release of a report containing the various names, the court emphasized that this was just the sort of information that should be withheld to protect individuals against “embarrassment, shame, stigma, and harassment.” Both decisions provide useful discussion of the scope of the exemption.

D.C. Circuit — Kavanaugh Dissent May Signal Shift in Arbitrary and Capricious Review

Dissenting in American Radio Relay League, Inc. v. FCC, 2008 WL 1838387 (D.C. Cir. 2008), Judge Kavanaugh challenges both the structure and substance of arbitrary and capricious review as we have known it since Portland Cement Ass’n v. Ruckelshaus, 486 F.2d 375, 393 (D.C.Cir.1973). To those who agree with him, it’s simply that Vermont Yankee meant what it said in prohibiting courts from adding to the minimum APA procedural requirements for informal rulemaking. To the majority in American Radio Relay League, the APA itself imposes the various elements of modern arbitrary and capricious review.

Responding to the internet age, the FCC used the informal rulemaking process to adopt a rule that would “facilitate the use of electric power lines for broadband Internet access.” The American Radio Relay League, representing amateur radio operators, opposed the rule on the ground that it would permit unacceptable interference with the radio frequencies used by its members. After the FCC issued the propose rule, the League filed a Freedom of Information Act request seeking the various studies on which the FCC had relied. The FCC withheld several studies, later releasing five studies from which it had redacted “preliminary or partial results or staff opinions that were part of the deliberative process.” The FCC later said that the redacted portions were not “relied upon in the decision making process.”

The League challenged the rule on two grounds of interest here. First, it argued that the Commission’s refusal to release the various studies violated the Portland Cement requirement that an agency make available the studies and data on which it relied in issuing a proposed rule. The majority agreed, holding that the Commission’s reliance on parts of the studies required it to release the studies in their entirety since the League had shown that the redacted pages might reveal weaknesses in the data or methodology on which the Commission had relied. Noting its narrow holding, the court emphasized that the redacted materials were “inextricably bound to the studies as a whole and thus to the data upon which the Commission has stated it relied.” Judge Tatel, concurring, emphasized that the APA requires that review be on the “whole record,” so that the agency had to release the reports on which it relied, “warts and all.”

Second, the League challenged the agency’s choice of a particular “extrapolation factor” for determining the extent of interference with existing licensees. The League argued that the FCC had not adequately supported its reliance on certain modeling data and that it had failed to consider the only empirical evidence in the record. The majority agreed, remanding for further explanation.

Judge Kavanaugh concurred as to the FCC’s failure to disclose the studies, but only because he was forced to accept Portland Cement and related precedent in the D.C. Circuit. Emphasizing the minimal requirements of Sections 553(b) (notice to include “terms or substance of the proposed rule or a description of the subjects and issues involved” — emphasis by Judge Kavanaugh) and 553(c) (“concise general statement” of “basis and purpose”), he argued that “the Portland Cement doctrine cannot be squared with the text of § 553 of the APA,” and thus violates Vermont Yankee.

As to the “extrapolation factor,” Judge Kavanaugh found that the agency had adequately explained that “factual disagreements and uncertainty” justified rejection of the proffered empirical evidence and that the agency’s explanation was otherwise reasonable.

Perhaps more important, Judge Kavanaugh argued that both the “procedural” requirements imposed by Portland Cement and its progeny and the intrusive review since State Farm “gradually transformed rulemaking—whether regulatory or deregulatory rulemaking—from the simple and speedy practice contemplated by the APA” into one that seems to last forever and hinders the Executive Branch in technological or political change. This is a fundamental challenge to judicial review of legislative rulemaking as it has been practiced for the last thirty-five years.

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It essentially rejects the adversarial, fairness-oriented model in favor of a legislative model that would give much greater leeway to agency rulemaking.

1st Circuit — Generic Rules Trump Pleas for Individualized Decisionmaking

The time has come to relicense existing nuclear power plants. In the absence of any means of disposing of used nuclear fuel (so-called “spent fuel”), reactor operators have stored the spent fuel in large pools at the site of each reactor. Alleging that the Nuclear Regulatory Commission was required under the National Environmental Policy Act to consider serious questions that have been raised about the safety of spent fuel storage, Massachusetts petitioned to intervene in the relicensing proceedings for two New England nuclear reactors.

Unfortunately for Massachusetts, the NRC several years earlier had decreed that issues common to all nuclear power plants would be addressed generically, rather than on a plant-by-plant basis. Massachusetts acknowledged that its concerns were not specific to the two reactors in question. The agency had also, through the legislative rulemaking process, undertaken a generic review of the safety of spent fuel, a review that Massachusetts essentially claimed was obsolete. Despite that claim, the NRC dismissed Massachusetts as a party to the licensing proceedings, relegating the Commonwealth to a petition to revise the existing rule on spent fuel storage. The First Circuit upheld the NRC’s decision in Massachusetts v. United States, 2008 WL 927941 (1st Cir. 2008).

In its essence, this decision merely follows the well-established principle (see, e.g., U.S. v. Storer Broadcasting Co. and Heckler v. Campbell) that an agency may resolve generic issues through legislative rulemaking and apply the result to any adjudication in which the issues might arise. The twist in this case, however, is that Massachusetts alleged that the rule had been overtaken by more recent knowledge concerning spent fuel storage. The state had two concerns: (1) the substantial deference due an agency’s consideration of petitions for rulemaking, and (2) the fact that if it were not a party, it could not move to delay relicensing pending resolution of the issues raised in the petition for rulemaking. As to the first, the court’s answer was essentially, “tough luck.” That’s simply the nature of the administrative beast. As to the second, the court took the NRC at its word that Massachusetts could participate in the licensing proceeding as an “interested governmental entity,” in which capacity it could petition to delay the relicensing pending resolution of the rulemaking proceeding. “By staking its position regarding procedural avenues available to the Commonwealth in this case, both in its administrative decisions and in its representations before this court, the agency has, in our view, bound itself to honor those interpretations.” The court then stayed the close of the relicensing hearings for two weeks to allow Massachusetts the opportunity to petition for the appropriate status in the hearings. The issues would presumably be much more difficult were the challenger an affected citizen, to whom the “governmental entity” option would not be available.

In retrospect, the decision seems simple enough. Surely it was clear from the beginning that the NRC considered spent fuel safety to be a generic issue. From the litigant’s perspective, the question is whether to try to become a party to the licensing proceeding in this situation. If the challenger tries and loses, it can then pursue other avenues, such as the rulemaking proceeding. If the challenger foregoes the licensing proceeding, it takes the risk that the agency will argue that failure to seek intervention precludes any other participation. Massachusetts v. NRC should at least increase confidence in the strategy of proceeding directly to the generic challenge.

3d Circuit — Panel Splits on FDA Preemption

Following closely on the heels of Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008), which found express preemption of certain state requirements allegedly violated by an FDA-approved medical device, the Third Circuit in Colacicco v. Apotex Inc., 521 F.3d 253 (3d Cir. 2008), examined the question of whether FDA approval of the label for certain depression medications resulted in conflict preemption of more stringent warning requirements that might otherwise be imposed under state statutory or common law. Granting Skidmore deference to the FDA’s view of the preemption, the majority found preemption based largely on FDA’s determination that there was no scientific basis for the alleged inadequacy of the warning. The dissent emphasized the strength of the presumption against preemption of state law and charged the FDA with seeking the “backdoor federalization” of state tort law.

The initial question was whether there is a presumption against preemption of state rules of this sort. The majority be grudgingly agreed that there is, but it emphasized that “the purpose of Congress [is] the ultimate touchstone of pre-emption analysis.” Thus, it said, there is a tension between “such a presumption, which emphasizes the clear and manifest purpose of Congress, and implied conflict preemption, which analyzes preemption in the absence of any explicit intent.” This approach seems to weaken the presumption by treating it as merely an element to be balanced, rather than an obstacle to be overcome by a sufficient showing of congressional intent to preempt. The dissent disagreed sharply, arguing that the
presumption can be overcome only with a clear congressional intent to preempt. Although conflict analysis inherently sidesteps direct expressions of congressional intent, the dissent agreed preemption could arise from a clear conflict between federal and state requirements. It could not, however, arise here, where it is not entirely clear that state supplementation of federal requirements constitutes a serious conflict that would have been of concern to Congress. With protection of the public health at the heart of police power, the FDA judgments were not enough, in the dissent’s view, to overcome the presumption.

Turning to question of whether the FDA’s actions preempted state law, the majority emphasized the comprehensive nature of the regulatory scheme and the fact that the FDA had specifically concluded that there was no scientific basis for claims that the medications at issue posed an increased risk of suicide, so that any warnings to that effect would be misleading. Thus, the core of the opinion appears to be the FDA’s expert judgment, which is entitled to great respect, rather than the FDA’s assertion about the preemptive nature of its actions, which is entitled only to Skidmore deference.

As to the alleged conflict, the dissent agreed that the FDA’s views were entitled to Skidmore deference, but it found that the factors weighed against the agency. The dissent also could not find a conflict, suggesting that it was very unlikely that the FDA would ever penalize a drug company for overwarning, whether on its own or in response to some state mandate. The dissent also emphasized the value of state tort law in forcing information from drug companies and “in aligning drug manufacturers’ incentives to find the right balance between safety and efficacy.” Preemption, the dissent argued, was for Congress to decide.

4th Circuit Splits in Rejecting Sovereign Immunity for TVA

In another federal-state struggle, the Fourth Circuit in North Carolina v. TVA, 515 F.3d 344 (4th Cir. 2008), rejected TVA’s argument that it was immune from a nuisance action brought by North Carolina as a result of pollution from TVA’s coal-fired power plants. There were two issues, (1) whether the discretionary function doctrine precluded the lawsuit, and (2) whether a Clean Air Act provision permitting suits to enforce “requirements” of state law encompassed requirements arising from the state common law of nuisance.

The majority rejected the discretionary function argument for two reasons. First, it held that a statutory provision that TVA could “sue and be sued,” which was to be liberally construed, constituted a full waiver of sovereign immunity. Second, the majority rejected the proposition that separation of powers required discretionary function immunity as to TVA. The majority argued, essentially, that the TVA does not count as an arm of government for this purpose because it is quasi-private, with a separate budget, separate board of directors, and the like. In any case, the majority found that imposition of nuisance-related requirements would not violate separation of powers because the Executive would still decide how to comply with the various requirements. Moreover, courts had long handled nuisance actions, so the decision was well within the judicial role.

As to TVA’s argument that the Supremacy Clause barred this lawsuit, the majority found an explicit waiver of Supremacy Clause immunity in a Clean Air Act provision requiring federal facilities to comply with state law “requirements.” Relying on the plain meaning of that word, the majority held that it encompassed the requirements of state nuisance law.

The dissent argued that separation of powers concerns required a congressional waiver more explicit than the “sue and be sued” provision relied upon by the majority to overcome discretionary function immunity. Having created TVA, with the inevitable result of air pollution affecting downwind states, it was up to Congress, rather than various different states, to decide TVA’s responsibilities.

9th Circuit — Panel Splits on Chevron Deference to IRS Informal Issuance

Contrary to the understanding of many tax practitioners, Judge O’Scannlain, concurring in Tualatin Valley Builders Supply, Inc. v. U.S., 2008 WL 962106 (9th Cir. 2008), argued that an IRS Revenue Procedure qualified for Chevron deference. The majority avoided resolving the Chevron question by ruling for the IRS under Skidmore deference, but Judge O’Scannlain argued that it was important to address a conflict in prior 9th Circuit decisions.

In 2002, Congress allowed certain taxpayers to elect a five-year loss carryback from 2001 and 2002. The statute specifically provided that taxpayers could take the election “in such manner as may be prescribed by the Secretary [of the Treasury] ...” Congress did not, however, specifically address the status of taxpayers who had previously taken the then-permissible two-year loss carryback. In Revenue Procedure 2002-40, issued without notice and comment and published in the Internal Revenue Bulletin, the IRS established October 31, 2002, as the deadline for any such filings. The taxpayer in question here did not file until January 2003. Responding to the taxpayer’s challenge, the IRS argued that its Regulatory Procedure was entitled to Chevron deference.

Both the majority and the dissent provide a somewhat confusing discussion of Chevron, but the dissent ultimately articulated an appropriate reason that Chevron deference should apply to this particular Revenue Procedure, although not necessarily to other IRS informal issuances. The confusion arises from the fact that Congress created the longer five-year loss carryback period but did not address the status of taxpayers who had already taken the existing two year loss period. Thus, there was an interpretive question whether the Secretary’s specific authority to determine how the election must be continued on next page
made applied this class of taxpayers. If that question were answered in the affirmative, there would be the additional question of whether the Revenue Procedure itself was arbitrary and capricious.

Unfortunately, neither the majority nor the concurrence articulated the issues distinctly in this way. Instead, the majority quoted *Chevron* for the proposition that the exercise of an “express delegation” is subject to arbitrary and capricious review and then said that if the Revenue Procedure were entitled to *Chevron* deference, the court would have to uphold a reasonable position. This conflates the “express delegation,” whose exercise is subject to arbitrary and capricious review, and the implicit delegation of interpretive authority, whose exercise is subject to reasonableness review. Assuming the two standards are distinct (a matter of some dispute), the majority’s articulation appears to weaken the agency’s position in implementing an express delegation of authority. But the majority avoided the *Chevron* issue as it bore on the Revenue Procedure.

Judge O’Scannlain confronted *Chevron* in a manner that should provide a model for determining whether *Chevron* applies to an informal issuance. It is important to recall that *U.S. v. Mead* held that *Chevron* applies where Congress has delegated authority to act with the force of law and where the agency has issued the interpretation in the exercise of that authority. As Judge O’Scannlain emphasized, *Mead* also said that such a delegation may be demonstrated through the power to engage in notice and comment rulemaking, “or by some other indication of a comparable congressional intent.” Judge O’Scannlain took seriously this admonition to determine whether Congress would have intended the courts to defer to a particular agency statement.

As an important threshold matter, he emphasized that his conclusion applied only to this particular delegation of authority, not to Revenue Procedures in general. Three factors then drove him to conclude that Congress intended the sort of “force of law” to which the courts should defer. First, Congress had granted the IRS the general authority to “prescribe all needful rules and regulations” to enforce the Internal Revenue Code. Second, Congress had specifically authorized the IRS to prescribe the manner in which the five-year carryback would be elected. Third, Congress would have understood that it was impracticable for the IRS to pursue notice and comment rulemaking in creating the election procedures. Thus, although the IRS generally takes the position that its Revenue Procedures do not have the force of Treasury Regulations entitled to *Chevron* deference, there may be times when one can argue successfully that Congress would nonetheless have expected deference in the particular circumstances. The same is presumably true of deference to the informal issuances of other agencies.

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unconvinced, emphasizing that this interpretation would ignore conflicts between the Talent Agency Act and the FAA. Specifically, “[p]rocedural prescriptions of the TAA [Talent Agency Act] . . . conflict with the FAA’s dispute resolution regime in two respects: First, the TAA, in § 1700.44(a), grants the Labor Commission exclusive jurisdiction to decide an issue that the parties agreed to arbitrate . . .; second, the TAA, in § 1700.45, imposes prerequisites to enforcement of an arbitration agreement that are not applicable to contracts generally . . . .” *Id.* at 985. In light of these conflicts, the FAA preempted the state law.

On the same day, the Court also decided *Riegel v. Medtronic, Inc.*, --- U.S. ---, 128 S. Ct. 999 (Feb. 20, 2008). In this 8-1 decision authored by Justice Scalia (Justice Ginsburg dissented; Justice Stevens concurred in the judgment), the Court concluded that the Food and Drug Administration’s (FDA’s) premarket approval process under the 1976 Medical Device Amendments (MDA) to the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 360c et seq., imposed device-specific “requirements” sufficient to trigger the MDA’s express preemption provision and hence to preempt state negligence and strict liability torts related to the medical device so approved. After reviewing the extensive FDA pre-market approval process, the Court reiterated prior case law conclusions that federal preemption under the MDA is specific to particular medical devices; hence, the FDA’s regulations must impose specific duties for particular devices before those regulations can preempt state law. *Id.* at 1006-07 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 493-501 (1996)). However, unlike in its general regulations, the FDA does impose such device-specific “requirements” in its premarket approvals, and hence those requirements could be the basis of federal preemption of state law. Moreover, the Court affirmed its prior conclusion that state negligence and strict liability duties are countervailing state law requirements for such medical devices. *Id.* at 1007-08. As a result, the FDA’s premarket approvals for medical devices preempt state law torts to the extent that tort duties contradict duties imposed under the MDA. *Id.* at 1011.

The third case of the preemption trilogy was *Rowe v. New Hampshire Motor Transport Association*, --- U.S. ---, 128 S. Ct. 989 (Feb. 20, 2008). In this 9-0 opinion by Justice Breyer, with Justice Stevens concurring in part, the Court concluded that, pursuant to express preemption provisions, the Federal Aviation Administration Authorization Act preempted Maine laws regulating the delivery of tobacco to customers in Maine.
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1. Kenneth A. Bamberger, Normative Canons in the Review Of Administrative Policymaking, 118 Yale L. J. ___ (2008) (Forthcoming), Available at http://ssrn.com/abstract=1116782. This article discusses whether courts or agencies should have primary responsibility to apply “normative” canons of statutory interpretation — i.e., canons of statutory interpretation that are grounded in extra-statutory, usually constitutionally based “background norms” such as respect for the rights of regulated persons, avoidance of constitutional questions and protection of states and Native American tribes. Such normative canons, because they reflect value choices, do not fit readily within Step one or Step two of the Chevron v. NRDC, 467 U.S. 837 (1984) interpretive structure. The author discusses the debate between those, including the Supreme Court, who place such normative canons within the judiciary’s responsibility under Chevron step one, and others who favor greater agency interpretive responsibility under step two. The author ultimately comes down on the side of giving agencies primary interpretive responsibilities under Chevron step two.

2. Orly Lobel, Citizenship, Organizational Citizenship, And The Laws Of Overlapping Obligations, Forthcoming, __________ Calif. L. Rev. _____ (2008). Available at http://ssrn.com/abstract=1114924. This article, critiquing Garcetti v. Ceballos, 547 U.S. 410 (2006), advocates greater protection for whistleblowing by individuals within organizations. The author argues that the Garcetti opinion is reflective of a “deep ambivalence” in the legal system about individuals’ role in policing illegal activity by members of their group. The author seeks to provide analytical clarity and doctrinal coherence to the multiple rationales that underlie the laws of retaliatory discharge and organizational loyalty, and proposes a model, prioritizing internal resolution, in which individuals in organizations have responsibility not just to members of their group and the organizational chain of command but also to compliance and legality.

3. Huyen Pham, The Private Enforcement of Immigration Laws, 96 Geo. L. J. 777 (2008). This article analyzes federal and local laws which shift enforcement of immigration laws to private parties. Such private enforcement measures are often intended as a mechanism to provide additional resources for immigration law enforcement. One example of such a measure is federally imposed employer sanctions for hiring illegal immigrants, which induce employers to monitor the immigration status of their employees. The author argues, though, that such private enforcement measures have only a symbolic impact on illegal immigration, while substantially increasing the risk of racial, ethnic, and anti-immigrant discrimination. Accordingly, the author argues for government, rather than private, enforcement of immigration laws.

4. Sidney A. Shapiro and Christopher H. Schroeder, Beyond Cost-Benefit Analysis: A Pragmatic Reorientation, 31 Harv. Envtl. L. Rev. ____ (2008), Forthcoming. Available at: http://ssrn.com/abstract=1087796. This article is an in-depth critique of the dominance of cost-benefit analysis (CBA) in regulatory policy analysis, particularly what the authors consider to be a “one-size-fits-all” over-reliance on CBA in the current form of regulatory impact analysis (RIA) centered institutionally in the federal Office of Information and Regulatory Affairs (OIRA). The authors advocate abandoning CBA, except where legally required. They propose an alternative, “pragmatic regulatory analysis” which is problem-oriented, normative, discursive, and transparent and grounded in different premises than the stubbornly reductionist cost-benefit-analysis. The article comprehensively discusses 1) the evolution of the general theory of policy analysis, 2) the particular emergence of cost-benefit-analysis as a form of policy analysis, 3) the separate evolutionary path of federal regulatory impact analysis, and 4) the flaws of cost-benefit-analysis, particularly CBA’s incorrect claims of apolitical, objective rationality. The authors then 1) describe the pragmatic regulatory analysis alternative, 2) discuss two case studies that demonstrate how the pragmatic regulatory analysis approach might function, and 3) counter possible objections to the pragmatic regulatory analysis approach.

5. Hickman, Kristin E. and Krueger, Matthew D., In Search of the ’Modern’ Skidmore Standard, 108 Colum. L. Rev. 1235 (2007). This article is an empirical study of how federal Courts of Appeal are applying Skidmore v. Swift & Co., 323 U.S. 134 (1944), after Christensen v. Harris County, 529 U.S. 576 (2000) and United States v. Mead Corp., 533 U.S. 218 (2001). The authors examined all federal Court of Appeals opinions which cited Skidmore, Mead or Christensen, issued during the first five years after the Supreme Court’s Mead decision (450 in total.) The authors concluded that the Courts of Appeals are divided between two divergent approaches to Skidmore review — one, a “no deference” standard in which the courts apply their own judgment of the proper interpretation of the statute, and two, a “sliding scale” deference standard in which the Court varies the level of deference based upon a variety of factors, such as the agency’s level of expertise, the thoroughness of the agency’s consideration, need for

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uniformity, etc. The authors found that in the Circuit courts, 1) the “sliding scale” approach was the overwhelmingly predominant view, and 2) Skidmore review was still highly deferential to agency interpretations, albeit less so than Chevron review.

6. Molot, Jonathan T., Ambivalence about Formalism, 93 VA. L. REV. 1 (2007). The author advocates using administrative law to reconcile what he asserts are divergent approaches to statutory and constitutional interpretation — formalist for statutory interpretation, and interpretivist for constitutional interpretation. This divergence in interpretive methods is rooted in a false belief that constitutional and statutory interpretations involve different principal (drafter) — faithful agent (interpreter) problems. Instead, the author argues, the more flexible administrative law approach to the principal-agent problem should serve as the model for addressing principal-agent issues in both statutory and constitutional interpretation. This approach would give judges more discretion in statutory interpretation but less discretion in constitutional interpretation.

7. Johnsen, Dawn E., Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. REV. 1559 (2007). Highlighting the difficulties of Congressional and Judicial review of executive branch decisionmaking, the authors advocate increased attention to legal advisors within the executive branch, whom the authors describe as an “underappreciated and underestimated source of constraint” on unchecked Presidential power, particularly in the absence of effective judicial review. Using as a case study the Bush Administration’s oft-criticized legal positions regarding the interrogation of detainees suspected of terrorism, the authors discuss the proper role of the Office of Legal Counsel (OLC), and other executive branch internal processes in policing the legality of executive branch action. The article recommends standards and processes to be used by OLC attorneys when counseling executive branch officials, including model “Guidelines” drafted by nineteen former OLC attorneys.

8. Hill, B. Jessie, The Constitutional Right To Make Medical Treatment Decisions: A Tale Of Two Doctrines, 86 TEX. L. REV. 277 (2007). In this article the author asserts a constitutional right to protect one’s own health by making medical decisions free from regulation by the state. The author notes the Supreme Court’s divergent approaches to this issue in cases addressing partial birth abortion Stenberg v. Carhart (Carhart I), 530 U.S. 914, 938 (2000), and medical marijuana, United States v. Oakland Cannabis Buyers’ Coop, (OCBC), 532 U.S. 483 (2001). Although the Supreme Court recently appeared to be moving awkwardly toward a reconciliation of these approaches in the second Carhart case, Gonzalez v. Carhart, 127 S. Ct. 1610 (2007), many questions remain unanswered. The author advocates unifying two divergent lines of cases — 1) a public health line of cases, beginning with early 20th century mandatory vaccination cases, which authorize state intervention and 2) the post—Griswold v. Connecticut, 381 U.S. 479 (1965)“autonomy” line of cases. The author argues that a constitutional right to protect one’s own health has already been recognized by the Supreme Court decisions in these cases but has been clouded by improper judicial deference to legislative facts. The author argues against “excessive judicial deference” to legislative facts in these areas and for clear recognition of a universal constitutional right to protect one’s health.

9. Atlas, Mark, Enforcement Principles and Environmental Agencies: Principal—Agent Relationships in a Delegated Environmental Program, 41 LAW & SOC’Y REV. 939 (2007). This article is an in-depth study of state enforcement of federal environmental regulations. The author found that state penalties typically are 1) substantially lower than federal penalties, 2) related to i) the partisan composition of elected officials, and ii) the “type, seriousness, and number of violations of enforcement actions. In contrast, factors such as the 1) influence of organized interest groups, 2) agency sensitivity to economic conditions or the economic importance of regulated industries, and 3) environmentalist preferences of elected officials and the public are typically unrelated to enforcement stringency.

10. Donahue, Debra L. Federal Rangeland Policy: Perverting Law and Jeopardizing Ecosystem Services, 22 J. LAND USE & ENVTL. L. 299 (2007). This article criticizes the Bureau of Land Management’s (BLM’s) management of rangeland. The article focuses on the problem of weed infestation of rangeland by many non-native invasive species which are destructive of the ecology of these lands. Such infestation leads to a loss of biological diversity, overharvesting and climate change. Instead of addressing this problem, though, the BLM focuses too much attention on supporting livestock grazing which actually is a major cause of the problem. Unfortunately, current BLM solutions, such as chemical weed control, would make the problem worse not better.

11. Eskridge, William N., Jr., America’s Statutory “Constitution,” 41 U.C. DAVIS L. REV. 1 (2007). The author, contrary to conventional wisdom, concludes that statutes and the legislative process, not Courts, are and ought to be the major mechanism for elucidating constitutional values because legislative processes better permit the Constitution to evolve over time. Such statutes are a law or series of laws that “(1) seek to establish a new normative or institutional framework for state policy and (2) over time ‘stick’ in the public culture such that the super-statute and its institutional or normative principles have a broad effect on the law.” The author
calls such statutes “super-statutes,” because their function is to explicate the meaning of constitutional provisions. He argues that, accordingly, law schools should pay more attention to legislative and administrative law than they do to traditional constitutional law.

12. Guthrie, Chris, Rachlinski, Jeffrey J., and Wistrich, Andrew J., Blinking On The Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1 (2007). This article is an empirical study of trial judges which cleverly examines the role of intuition vs. deliberation in judicial decision-making. The authors conclude that judges make decisions intuitively first, but sometimes override their intuition by deliberation.

13. Nussbaum, Martha C. Foreword. Constitutions And Capabilities: “Perception” Against Lofty Formalism, 121 HARV. L. REV. 4 (2007). The author advocates a normative approach to making governmental decisions about the nature of government. This method, which dates back to Aristotle and the Stoics, is the “capabilities approach” in which the role of Constitutions in organizing government is to provide a foundation for people to advance certain human “capabilities,” which the author describes as “the prerequisites of a life worthy of human dignity.” The author argues that the 2006 Supreme Court term signaled a retreat away from protection of these values, substituting a “lofty formalism” in which decisions are made with no regard to their effect on the lives of people subject to them.

14. Claus, Lawrence, The One Court That Congress Cannot Take Away: Singularity, Supremacy, And Article III, 96 GEO. L.J. 59 (2007). The author argues that, contrary to Chief Justice John Marshall’s position in Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803), the text and original intent of Article III indicates that Congress lacks power under the Exceptions clause of Article III (§ 2, cl.2) to entirely strip the Supreme Court of all jurisdiction to decide cases otherwise within the Article III jurisdiction of the federal Courts. Instead, the Exceptions clause only permits Congress to change the Supreme Court’s jurisdiction from appellate to original.

* Preemption Articles: Listed below are some of the many recently published pre-emption articles.


* Symposia of Interest

Innovative Application of Administrative Adjudication Paternity Determination in Georgia

By Lois Oakley

The Welfare Reform Act requires the states to utilize administrative procedures to expedite child support-related procedures. See 42 U.S.C. §§ 666(a) & (c) (2008). Georgia’s child support statute grants the Georgia Office of State Administrative Hearings the authority to adjudicate the issue of paternity and establishes that an administrative determination has “the same force and effect as a judicial decree.”

This legislative framework provides the authority for an innovative adjudication process within the jurisdiction of Georgia’s central panel. The state Supreme Court has observed that “due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” Nodvin v. State Bar, 273 GA 559, 560 (2001). This flexibility is evidenced in the design of an administrative adjudication process which is convenient to the parties, provides expeditious adjudications, and results in amicable resolutions.

The adjudication process commenced by the tribunal’s notification of the putative parent of a hearing for the determination of paternity before an administrative law judge. The putative parents are welcomed at the hearing site by a constellation of child support specialists who are prepared to resolve both the determination of paternity and the corollary support obligation in an expeditious manner. Present at the hearing location are genetic screeners and financial data intake specialists, as well as child support agents who are skilled in the mediation of support agreements. Assisting with the documentation of enforceable orders are staff attorneys from the Georgia Office of State Administrative Hearings. Those cases which are not resolved informally are determined at an evidentiary hearing by an administrative law judge.

The success of the administrative paternity determination process in Georgia is attributable to the flexibility inherent in state administrative adjudication. The statewide jurisdiction conferred upon a central panel is employed to avoid the delay involved when jurisdictional issues dictate a second filing in a judicial context. The administrative process provides the ability to site the adjudications in locations which allow the confluence of all necessary services. Experimentation with innovative scheduling techniques has resulted in the successful resolution of an unusually high volume of cases. The absence of filing fees for administrative adjudications and successful service of process by mail contributes to an inexpensive paternity determination procedure for the benefit of Georgia’s children. The success of the process can also be measured by the relatively large number of cases which are resolved amicably in advance of an administrative hearing. Annually, thousands of Georgia families are benefitted by this innovative adjudication process.

The flexibility of administrative adjudication has been harnessed to provide a user-friendly forum for the expeditious and inexpensive adjudication of paternity and child support obligations throughout Georgia.

Private Due Process Goes to the Movies

By Michael Asimow

When federal, state, or local government deprives you of liberty or property, the due process clauses of the 5th and 14th amendments require it to provide a hearing. However, if a non-governmental actor (like your boss) does the same thing, federal due process does not apply. In matters of administrative law, California is a maverick, and a long line of California common-law cases applies due process to decisions of powerful private sector decisionmakers.

For example, California law requires a private hospital to provide a hearing when it removes a physician from the staff. A private medical organization that controls access to practice must provide a hearing when it refuses to admit an applicant. Unions that control access to employment must do the same. In a major extension of private due process, the California Supreme Court required a health insurance company to provide a hearing when it kicked a doctor off the preferred provider panel because of too many malpractice claims. Potvin v. Metro. Life Ins. Co., 95 Cal.Rptr.2d 496 (2000). The possibilities are endless.

Bob Yari was one of six credited producers of the Oscar winning best-film Crash but wasn’t on the stage when the producers picked up their statuettes. Only three producers get to bask in the glory and give speeches thanking their pets. The choice of the top three is made by the Producers Guild and is accepted by a committee of the Motion Picture Academy which presents the award. Yari complained bitterly to the Guild and the Academy but got nowhere. They also refused to give him a hearing.

The California Court of Appeal refused to extend private due process to Yari’s claim because the decision in question was not as important to Yari’s life as those mentioned above. Yari v. Producers Guild of America, 73 Cal.Rptr. 3d 803 (2008). The Guild’s decision didn’t prevent him from practicing his profession as a movie producer since the Guild doesn’t control access to that profession. Instead, the decision was analytically similar to the Academy’s decision as to what actor will win the Oscar—and the court was not about to extend a hearing right to the losers!

Nevertheless, private due process is an expanding concept, both in the US and around the world, especially in this era of privatization of government functions. Lawyers should watch for opportunities to extend the California precedents to their home states.

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