

ADMINISTRATIVE & REGULATORY LAW NEWS

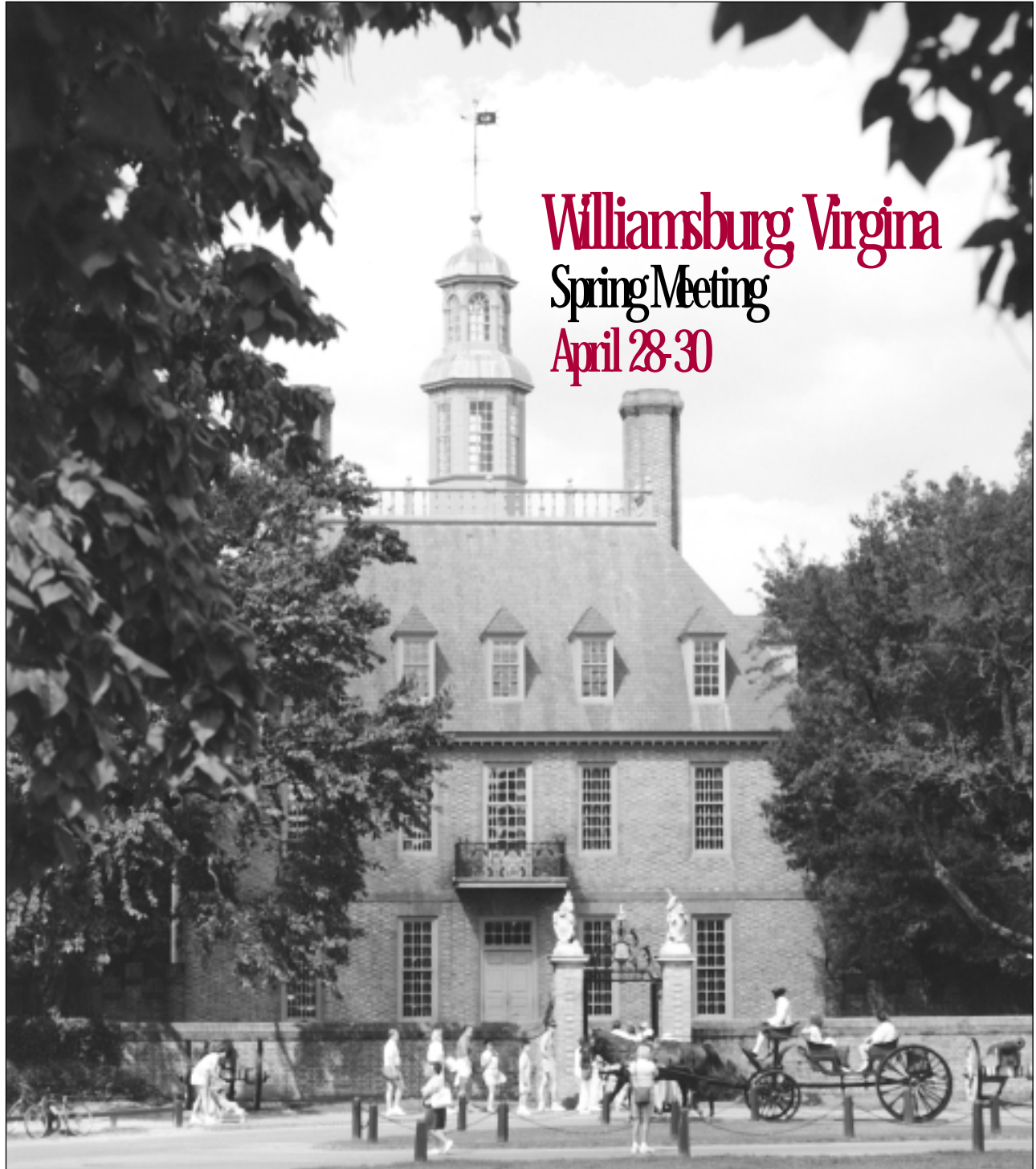


Section of Administrative Law & Regulatory Practice

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Chair's Message



John Hardin Young

The mission of the Section of Administrative Law and Regulatory Practice is: (1) to promote the sound development of local, state and federal administrative law, procedure and practice; (2) to promote regulatory reform through advancing the principles and gains made under the APA and to seek improvements thereof; (3) to bring about improvements and procedures of local, state and federal administrative agencies; (4) to bring about improvements in government personnel procedures, selection and operations; (5) to improve the skills of lawyers engaged in administrative law and regulatory practice; and (6) to promote scholarly research in the field of administrative law and provide for the publications of such research and other helpful information, or otherwise provide for its dissemination.

We pursue these goals through our committees and members. Our committees cover each administrative process and government function area of administrative law and practice. Our past work includes, for example, promoting the enactment of the Administrative Dispute Resolution Act, the Negotiated Rulemaking Act, significant reports on the scope of judicial review and ethics in government, and regulatory reform initiatives.

In pursuing our work the Section involves, as an integral – and necessary – part, private practitioners, judges and government officials. We are open to a diversity of ideas and to people committed to a fair exchange of ideas about improving the process that governs government. In that vein, the Section is in the midst of a multi-year project to review the Administrative Procedure Act.

As a leader in the profession which provides an independent voice in the areas of government and administrative process, our work deserves the attention of the bar, academia and government. Our efforts include, again by example, the upcoming or recent publication of books such as the *Federal ADR Deskbook*, the *Federal Administrative Procedure Sourcebook*, *A Guide to Federal Agency Rulemaking*, and *Administrative Law Developments*. These works promote the fair administration of

justice and the pursuit of democratic interests.

I encourage our members to continue their work in the Section. To those not involved, I hope you will take a hard look at our accomplishments and the independence with which we approach administrative law issues, and join us in our work. ◆

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Cover photo courtesy of the Colonial Williamsburg Foundation.

APA Project Progresses With Panel on FOIA

By William S. Morrow, Jr.*

Another piece of the Statement of Administrative Law puzzle has fallen into place with the introduction of a draft outline on the current state of law concerning access to government information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

The comprehensive 55-page outline is the work of co-reporters David C. Vladeck and Thomas M. Susman. Vladeck is the director of Public Citizen Litigation Group and a visiting professor of law at Georgetown University Law Center. Susman is a partner in the Washington DC law firm of Ropes & Gray and a past chair of the section. The draft and accompanying introduction may be accessed through the section's website at www.abanet.org/adminlaw/apa.

The outline was presented by a panel of FOIA experts at the section's midyear meeting in Dallas on February 11, 2000. Chief Reporter Paul R. Verkuil, dean of the Benjamin N. Cardozo School of Law in New York, acted as moderator. This was the third panel convened under the APA Project. The first panel was held at the section's 1999 annual meeting in Atlanta last summer and addressed administrative adjudication.

The second was held at the section's 1999 Administrative Law Conference in Washington, DC, last fall and covered judicial review and governmental management. Drafts presented at the earlier panels may be accessed through the section's website. Drafts on rulemaking and access to judicial review should be available through the section's website prior to the section's spring meeting this coming April.

The FOIA panelists were Vladeck and, sitting in for Susman, James T. O'Reilly, author of *Expanding*

the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy? 50 ADMIN. L. REV. 371 (1998). The panelists highlighted the important issues facing FOIA practitioners today by working from the authors' introduction to the draft statement, which sorts the current issues into two categories: systemic and exemption specific.

Systemic Issues

The panelists first posed the question of whether FOIA should be expanded to require affirmative disclosure of a broader range of matter or whether it should remain primarily a request-response-based system. Vladeck took the position that a move in the direction of more affirmative disclosure would reduce the friction and litigation characteristic of the current reactive structure. O'Reilly cautioned that wider disclosure of financial information in the hands of the government could have an adverse impact on stock markets and chill the public's interaction with federal agencies. Section secretary Cynthia Drew commented that it might not be appropriate or advisable to disseminate agency inspection and enforcement reports.

The next topic tackled by the panel was the backlog of requests that have built up at some agencies. Vladeck acknowledged that some agencies simply do not have the resources to efficiently handle the volume of requests received each year and singled out the FBI as one example. Vladeck volunteered that permitting wider/greater implementation and retention of user fees might be the solution to the extent a deficiency of resources is contributing to the problem. O'Reilly noted that the FDA has had fee retention authority for some time now, and it appears to have helped. Vladeck also raised the possibility of giving agencies more discretion in prioritizing their responses. Council member Judy Kaleta recommended devising a

A New Look

This issue of the *News* has a new look. The "blue" look, which was instituted in 1994, has been replaced with the maroon look. This coincides with the adoption of a new, uniform maroon cover for books published by the Section. The experiment with a glossy front and back page in the past two issues has now been fully adopted with an actual glossy front and back cover enclosing the substantive material in the *News*. While the look is new, the *News* will continue to try to bring members a wide range of news – from Section and member news to news of administrative and regulatory law developments from the courts, legislatures, and agencies.

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rule that establishes interagency working groups, finding the once-a-year training offered by DOJ insufficient for all agencies.

The panel next considered whether lower courts are right in limiting the scope of FOIA to shedding light on an agency's performance of its statutory duties. This is the interpretation placed by lower courts on the Supreme Court's decision in *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989), but Vladeck argued that Congress intended to overrule this precedent when it enacted The Electronic Freedom of Information Act Amendments of 1996. O'Reilly aired the same argument in the 1998 article cited above and believes the function of FOIA should be to illuminate how the federal government spends the public's tax dollars.

The final systemic issue broached by the panel was whether the ABA should take a stand on courts seemingly abdicating their duty under FOIA to place the burden of proof on the government and apply a de novo review standard. According to Vladeck, in most cases the government files boilerplate pleadings, avoids discovery, and quickly obtains a judgment. O'Reilly echoed this concern, remarking that courts now rarely ask to see the documents at issue. Consequently, the success rate of requesters has fallen from 40%, in Vladeck's estimation, to 5%-7%, in O'Reilly's. Past section chair Ron Cass wondered whether the size of the judiciary's caseload partly explains the level of scrutiny described by the panelists, which prompted Vladeck to question whether in camera review should be made mandatory. Vladeck also ventured that a return to an arbitrary and capricious standard would be an admission that FOIA is unenforceable.

Exemption Specific Issues

The discussion of exemption specific issues began with consideration of the outline section titled: "Exemption 4: Trade secrets and confidential commercial information." The discussion under this category focused mostly on confidential commercial information. Vladeck summarized the competing concerns that fuel current litigation within this category. Submitters believe disclosure should be prevented when there is a potential for competitive injury, not merely when the submitter can prove the existence of actual competition. Many in the requesters' camp advocate an exception that would require disclosure of even commercially sensitive information if disclosure would provide a benefit in terms of public health or safety. Vladeck offered the results of failed drug trials as one example of when the common good should be held to outweigh what he views as a negligible private interest. O'Reilly

believes that the public health issue is too fact specific to address within the structure of a broad APA exemption for confidential commercial information. He would advocate addressing the public health issue in the context of each agency's statute.

The discussion next turned to "Exemption 1: Classified national defense and foreign policy information." Vladeck voiced the concern that documented intelligence agency abuses have not animated the courts to carefully screen national secrecy claims. He agrees the judiciary should not substitute its judgment for that of the executive branch, but argued that intelligence agencies should not have free rein. O'Reilly observed that executive prerogative affects agency decision-making and should be respected. The room appeared settled on the notion that the issue was largely one of institutional competence.

The panel finished with a deliberation of "Exemption 5: Internal agency memoranda or letters" as it relates to government settlement discussions. Vladeck pointed out that courts have uniformly required disclosure of documents shared with adversaries during settlement talks. The government has repeatedly argued for the equivalent of the Federal Rules of Evidence Rule 408 "settlement privilege" and has repeatedly lost. Vladeck queried whether this exemption should be amended to provide some relief to the Justice Department.

Verkuil closed with comments on how he foresees the APA project proceeding in the future. He found the question-and-answer format used by the FOIA panelists so helpful in stimulating dialogue that future panels will be asked to use the same approach. Rulemaking and Access to Judicial Review will be the topics at the spring meeting in Williamsburg. The rulemaking panelists are expected to be Peter L. Strauss, chair of the Rulemaking Committee and Betts Professor of Law, Columbia University School of Law; Jeffrey S. Lubbers, author of *GUIDE TO FEDERAL AGENCY RULEMAKING* (3rd. ed.); and Thomas O. McGarity, past co-chair of the Rulemaking Committee and W. James Kronzer Chair in Trial & Appellate Advocacy at the University of Texas School of Law. The judicial access panelists should include council member Harold H. Bruff, dean of the University of Colorado School of Law and Professor Cynthia Farina of Cornell Law School.

Verkuil anticipates that the annual meeting in New York this summer will see a panel on scope of review and a panel that will revisit adjudication. The individual project pieces will be assembled and presented at the 2000 Administrative Law Conference this coming fall, followed by a review at the 2001 midyear meeting next February and, hopefully, publication next spring. ◆

Council Capsules

A Brief Digest of Council Highlights From the 2000 Midyear Meeting

Council Revisits Position on Federalism Accountability Act

Section chair Jack Young reminded the council that this matter was being carried over from the fall meeting. Chair-elect Levin initiated discussion of the section's draft letter to Senator Thompson concerning S. 1214, the proposed Federalism Accountability Act. Levin said that this draft takes a more negative approach in response to comments from council members and others at the fall meeting with regard to Section 7's requirement that agencies conduct federalism assessments as part of their rulemaking duties.

The letter recommends that Senator Thompson's committee defer action on Section 7 until it has had time to consider: (1) what the total burden on agencies' rulemaking activities would be if the bill passed; (2) whether any federal agency's failure to consult with states has in fact created deleterious consequences; and (3) whether the putative benefits would be worth the additional burdens. Ernie Gellhorn thought the letter ought to take a position and not just report a division of opinion. Although there was some dissent, Randy May seemed to summarize the council's sentiment by stating that the section has a role to play in this matter and that the letter should stress the importance of harmonizing the proposed federalism assessment with the litany of other requirements agencies now face in the rulemaking process. Levin said he will work on the tone of the letter and stress harmonization as a desired goal.

Section 6 of the proposed act would narrow the circumstances in which preemption of state law by federal statute or regulation may be implied. Levin said the letter opposes adoption of Section 6 on the ground that it is based on the erroneous assumption that preemption is the norm. Council member Stephen Calkins disagreed, saying it appears to him that the letter is based on a faulty assumption: that there is no overarching problem. He also would like to see more analysis of the leading cases in this area.

Past chair Tom Susman reported that a similar bill appears to be moving in the House and urged the section to issue its comments before April to ensure consideration. Section chair Young said that the redrafted letter will go out to the council on the listserv for further comment and then be forwarded to Sen. Thompson.

Council Reconsiders Expansion of Federal Circuit's Veterans Affairs Jurisdiction

Veterans Affairs Committee Co-Chair Ronald Smith reported further on the proposed recommendation calling for Congress to grant the Federal Circuit jurisdiction to review precedent setting decisions of the Court of Appeals for Veterans Claims that involve questions of law not previously decided by the Board of Veterans' Appeals. Smith reminded the council that he had reported on this matter at the fall meeting and that the council had directed him to seek comments from the concerned agencies and rebrief the council in Dallas. He said that the committee has received comments from veteran service organizations and that he has a meeting scheduled to discuss this with the General Counsel of the Department of Veteran Affairs. The council had several questions about the recommendation and there was general discussion. There also was discussion about whether the recommendation should be taken to the ABA House of Delegates or sponsored under the section's blanket authority. The chair asked the committee to make changes to the recommendation based on the council's discussion and put the redraft on the council listserv to facilitate further discussion at the spring meeting.

Council Tables Recommendation on Harmonization of International Regulation

Sidney Shapiro, co-chair of the Regulatory Initiatives Committee, presented a preliminary recommendation and report regarding harmonization of domestic regulations with uniform international standards. He gave three reasons why section action was warranted: (1) there is a risk that agencies may act unilaterally and make international agreements without harmonization; (2) some harmonization activities take place outside rulemaking; and (3) harmonization may sometimes be conducted by outside organizations and exclude public input. Shapiro characterized the recommendation as something akin to an ACUS pronouncement, not a prescription for legislation.

The council was generally skeptical. Judge Stephen F. Williams was concerned that the recommendation blurs the lines between what requires comment under the APA and what does not and that it ignores the distinction between when environmental impact statements are required under NEPA and when they are not. Ron Cass thought the report did not adequately identify the problem. Judy Kaleta expressed a

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Supreme Court News

by William Funk*

States Rights With a Vengeance

The Court's Eleventh Amendment juggernaut has yet to find a stopping point, posing significant questions for federal regulation of activities in which states engage. The most recent case is ***Kimel v. Florida Board of Regents***, 120 S.Ct. 631 (2000), involving a suit for money damages under the Age Discrimination in Employment Act brought by a group of faculty and librarians of the Florida State University. Below, the 11th Circuit had held that the ADEA does not abrogate states' Eleventh Amendment immunity, an opinion concurred in by the 8th Circuit but disagreed with by the 2nd, 5th, 6th, 7th, 9th, and 10th Circuits. The Court, by a 5-4 vote, upheld the 11th Circuit's decision, holding that the 14th Amendment does not empower Congress to enact the Age Discrimination in Employment Act.

The Eleventh Amendment states:

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

It was enacted as a direct result of and to overrule the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), in which the Court had accepted jurisdiction in a diversity case brought against the state of Georgia by a citizen of another state. Early interpretations of the Amendment were that it did not bar suits brought under federal question jurisdiction (even if brought by citizens of another state) and barred only cases brought under diversity jurisdiction. In *Hans v. Louisiana*, 134 U.S. 1 (1890), however, the Court unanimously rejected that earlier precedent and in a case brought by a state's own resident held that the Eleventh Amendment broadly prohibited *any* suit against a state by an individual, absent the state's consent. The theory behind *Hans* was that, while the Eleventh Amendment's text only related to the particular issue involved in *Chisholm*, the underlying principle of the Amendment was that the Constitution had not abrogated state sovereign immunity from suits by individuals, although it did abrogate state sovereign immunity from suits by the United States or

another state. A contemporaneous case to *Hans* distinguished municipalities so that they do not partake of the immunity.

For a period it appeared that Congress under its Article I powers could override a state's Eleventh Amendment immunity, so long as Congress expressed that intent sufficiently explicitly. In *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), however, the Court overruled an earlier case and held that Article I does not contain the authority to overturn state sovereign immunity in suits brought in federal courts by individuals. In *Alden v. Maine*, 119 S.Ct. 2240 (1999), the Court made clear that Article I likewise does not authorize Congress to overturn state sovereign immunity in a state's own courts in suits by individuals. Last year, the Court closed another loophole by which state sovereign immunity might be overcome. An earlier case had held that a state could constructively waive its sovereign immunity by entering into a proprietary activity with knowledge that it was subject to federal regulation that included enforcement by private lawsuits. See *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964). In *College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 119 S.Ct. 2219 (1999), the Court overruled *Parden*, finding that if Congress could through its Article I powers exact constructive waivers from states, it would in effect be circumventing the prohibition on its overriding state sovereign immunity from suits by individuals.

The effect of this recent line of cases is to exempt states from individual suits under federal regulatory statutes in circumstances in which private actors would be subject to suit. For example, under *Alden*, while a private employer is subject to individual suit for damages resulting from violations of federal wage and hour laws, a similarly situated state employer would not be. Some have mischaracterized this situation as exempting state actors from the substantive requirements of the wage and hour laws, which is not true, and the provisions of the laws, including back pay orders, can be enforced by the Administrator of the Wage and Hour Division of the Department of Labor in federal court. Nevertheless, the resource limitations of federal agencies make it impossible to investigate and prosecute all violations. It remains to be seen whether or to what extent the limitations imposed by the

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Eleventh Amendment on individual law suits actually affect substantive compliance by states with various federal laws.

There remain two possible chinks in the armor afforded states under the Eleventh Amendment. First, the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), allows for federal suits against state officers for injunctive or declaratory relief, at least “in certain actions” the Court said in *Alden*. Second, because the 14th Amendment was adopted after the Eleventh, and because the 14th Amendment’s purpose included overriding contrary state interests, the Court has held that when Congress acts pursuant to its Section 5 authority “to enforce, by appropriate legislation, the provisions of [the 14th Amendment],” it may override state sovereign immunity to suit by individuals. It was the limits of this provision that were at issue most recently in *Kimel*.

It was conceded that Congress has authority under Article I to prohibit age discrimination in employment, but because Article I was insufficient authority to override state sovereign immunity, the Court went on to determine if the ADEA could have been passed under the authority of the 14th Amendment as well. Noting that Congress’s authority to “enforce” the 14th Amendment extends to remedying and deterring violations as well, the Court reiterated its recent test, adopted in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that the extent of that authority is limited to the extent that there must “be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” The Court applied that test to the ADEA and concluded that it failed the test. Age discrimination by a state is rarely unconstitutional. In fact, age discrimination is constitutional if it bears some rational relationship to a legitimate government interest, and the ADEA for the most part bars age discrimination without regard to possible rational justifications for such discrimination. Moreover, the Court stated that Congress had not identified any actual problem that needed remedying, suggesting that the real purpose of the extension of the ADEA to the states was not to deter or remedy *unconstitutional* age discrimination but to put public employers in the same position as private employers – a wholly justifiable basis for extension under Article I, but not a basis for relying on the 14th Amendment.

The Court no sooner decided *Kimel* than it granted certiorari in *Kimel II*, a suit against the state under the Americans with Disabilities Act in which

the lower court held that the ADA was not a valid exercise of Congress’s authority under the 14th Amendment. In addition, the lower court held that an individual could not sue a state officer to enforce the provisions of the ADA under the doctrine of *Ex parte Young*, if the person could not bring the suit directly under the ADA. Having narrowed one of the two remaining loopholes for private suits against states in *Kimel I*, the Court could use *Kimel II* to narrow the other as well. Also on tap is *Bizonkala v. Morrison*, which is not an Eleventh Amendment case, but which raises the question of the limits of Congress’s power under *both* the Commerce Clause and the 14th Amendment.

Kimel, like the other recent Eleventh Amendment/states rights cases, was a 5-4 decision, with the Court splitting along what is becoming an increasingly frequent fault-line – Rehnquist, Scalia, Thomas, O’Connor, and Kennedy v. Souter, Breyer, Ginsburg, and Stevens.

Citizens Suits Receive New Life

Citizens suits under the various environmental laws have not done well in the Supreme Court. ***Friends of the Earth v. Laidlaw***, 120 S.Ct. 693 (2000), is an exception.

In *Laidlaw*, the plaintiffs brought a suit under the Clean Water Act against a notorious polluter. Subsequent to the filing of the suit, the defendant came into compliance with its permit requirements, and the court consequently denied the plaintiffs’ request for an injunction. The court did, however, levy civil penalties against the defendant for its past violations. The defendant appealed the civil penalty award, arguing that as soon as the injunction was denied, the case became moot, because plaintiffs could not have standing merely to seek civil penalties that would be paid to the U.S. Treasury. Based on the Supreme Court’s decision in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), where the Court had said that a citizens group did not have standing to bring a citizen suit merely to obtain civil penalties, the court of appeals found for the defendants.

In a 7-2 decision in favor of the plaintiffs, the Court distinguished *Steel Co.*, saying that it only related to situations where the offending conduct had ceased before the suit was brought. Here it was not a question of initial standing, but of mootness, and the general rule is that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to

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“Issue Waiver” in Social Security Appeals — *Sims v. Apfel* in the Supreme Court

by Robert E. Rains*

On March 28, 2000, the Supreme Court heard oral argument in *Sims v. Apfel*, an unpublished decision from the 5th Circuit, a case of enormous practical importance both for litigants seeking judicial review of the denial of claims for Social Security benefits, and for the Social Security Administration (SSA) in defending against those claims. Most of these cases involve entitlement to either Social Security Disability Insurance benefits (SSDI) or Supplemental Security Income (SSI) or both.

As is well known, an individual seeking disability benefits from SSA enters into a four-tiered administrative process: initial application, reconsideration, *de novo* hearing before an administrative law judge (ALJ), and finally a request for review by the Appeals Council. Of course, if SSA issues a favorable decision at any step along the way, that usually ends the administrative proceeding. The administrative steps may be different in certain non-disability claims.

A claimant who has received a final denial by SSA of benefits, having exhausted his administrative appeals, has a statutory right to judicial review in federal district court. 42 U.S.C. § 405(g). In recent years, SSA has achieved considerable success in federal court asserting that issues not clearly raised on administrative appeal to the Appeals Council are waived, and thus cannot be heard by the reviewing court. The applicability to Social Security appeals of this doctrine, alternatively labeled “issue waiver” or “issue preclusion,” is the question before the Court in *Sims v. Apfel*.

Juatassa Sims’ long journey to the Supreme Court began in August 1994 when she filed a “concurrent claim” for SSDI and SSI. Her claim was denied initially and on reconsideration. After a *de novo* hearing at which Ms. Sims was represented

by counsel, a Social Security ALJ denied her claim again in March 1996. Ms. Sims’ attorney not only filled out SSA Form HA-520, “Request for Review of Hearing Decision/Order,” which contains only three lines to explain why a claimant seeks review, but also submitted a twelve page, single-spaced letter to the Appeals Council setting forth perceived errors in the ALJ’s decision. In May 1997, the Appeals Council issued its standard form letter denial of review, letting the ALJ’s decision stand as the final decision of the Commissioner of SSA denying benefits. Although the Appeals Council’s letter made reference to Ms. Sims’ attorney’s letter in support of her appeal, it did not specifically address any of her attorney’s arguments, but only stated that it had “concluded that the contentions do not provide a basis for changing the Administrative Law Judge’s decision.”

Through counsel, Ms. Sims appealed to the U.S. District Court for the Northern District of Mississippi, where the case was referred to a Magistrate Judge who received briefs and heard oral arguments. Addressing all issues raised by Ms. Sims, the Magistrate Judge issued a Report and Recommendation upholding the denial of benefits, which was approved and adopted by the district court in an unpublished opinion in January 1998.

Ms. Sims then appealed to the Fifth Circuit, with her counsel asserting that the ALJ: (1) failed to afford proper weight to a psychologist’s opinion that she was severely depressed; (2) improperly excluded certain of her impairments in assessing her residual functional capacity; and (3) should have

Ms. Sims sought certiorari on the question whether persons who appeal SSA denials are precluded from raising in court any issue not raised and briefed before the agency

ordered a consultative examination to assess her mental impairments. In an unpublished, two-paragraph opinion, a panel of the Fifth Circuit affirmed. The panel found no merit to Ms. Sims’

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first contention, but then, citing *Paul v. Shalala*, 29 F.3d 208 (5th Cir. 1994), the panel ruled, “We have no jurisdiction to review Sims’s second and third contentions because they were not raised before the Appeals Council.”

Ms. Sims sought certiorari on the question whether persons who appeal SSA denials are precluded from raising in court any issue not raised and briefed before the agency.

In its brief in opposition to certiorari, the government quoted the “well-settled” rule that “a party’s failure to raise an issue that he or she had an opportunity to present to an administrative agency ordinarily bars the party from raising the issue for the first time on appeal of the administrative decision,” citing *Unemployment Compensation Comm’n v. Aragon*, 329 U.S. 143, 155 (1946). Interestingly, the government disagreed with the Fifth Circuit’s rationale that it lacked jurisdiction to hear issues not raised to the Appeals Council, instead arguing that “the doctrine is one of judicial practice and does not involve a matter of appellate jurisdiction in the technical sense.”

The government noted that this case does not involve any due process claim for unrepresented claimants as Ms. Sims did have counsel below, and asserted that SSA’s policy is not to raise “issue waiver” in court where a claimant was not represented in the administrative process.

While acknowledging a split among the circuits, the government argued that certiorari was unnecessary

While acknowledging a split among the circuits, the government argued that certiorari was unnecessary as the problem would be cured by SSA’s intended amending of the form (SSA-1696-U4) by which a claimant appoints a representative. “That form in the future will advise the claimant’s representative that failure to present an issue to the Appeals Council may preclude the claimant from raising the issue upon judicial review of the agency’s decision.”

The government also argued that SSA is testing elimination altogether of requests for review by the Appeals Council.

At this writing (mid-February), only Petitioner and her amici have filed briefs on the merits in the Supreme Court. Petitioner’s brief relies heavily on two law review articles: Charles H. Koch and David A. Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration’s Appeals Council*, 17 FLA. ST. L. REV. 199 (1990), and Jon C. Dubin, *Torquemada Meets*

Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisitorial Administrative Proceedings, 97 COLUM. L. REV. 1289 (1997). The Koch and Koplow article is a searing critique of the Appeals Council based on a study performed under the auspices of the Administrative Conference of the United States (ACUS) in the late 1980s. The Dubin article criticizes the application of the issue exhaustion doctrine to the non-adversarial and informal Social Security administrative proceedings.

Petitioner also relies heavily on the Court’s unanimous decision in *Darby v. Cisneros*, 509 U.S. 137 (1993). In *Darby*, the Court held that in suits under the APA federal courts lack the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review “where neither the statute nor agency rules specifically mandate exhaustion as a prerequisite to judicial review.” Here, while the Social Security Act explicitly requires exhaustion of administrative remedies generally, neither it nor SSA’s regulations provide that one must raise specific legal issues to the Appeals Council in order to preserve them for judicial review. The issue, therefore, is whether a general exhaustion requirement includes an “issue exhaustion” requirement as well.

Petitioner argues that issue exhaustion should be inapplicable in the Social Security context.

Petitioner further argues that issue exhaustion should be inapplicable at least in the Social Security context since it would not serve any of its normal jurisprudential purposes, such as protecting agency autonomy by allowing the agency in the first instance to apply its special expertise and correct its errors and providing more efficient judicial review by permitting the parties to develop the facts of the case in the agency proceedings. On this point, the essential dispute is whether the rationales behind the normal issue waiver rule makes sense in the unique context of informal, non-adversarial Social Security administrative appeals. Petitioner argues that the operational reality of the Appeals Council is such that it seldom performs meaningful review and even less often provides informed views on issues to aid a court in further review, particularly inasmuch as its standard denial consists, as here, of a form letter. Obviously, the government argues that presenting specific legal issues to the Appeals Council prevents the agency from being sandbagged and assists the reviewing court by giving the Appeals Council the

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Section of Administrative Law and Regulatory Practice

2000 Spring Meeting

Meeting Chair: Christine C. Franklin

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Williamsburg, VA 23185
Telephone: 800-229-1000; Guest Fax: 757-220-7790

Friday, April 28

Registration

12:00 – 1:00 p.m. Williamsburg Lodge Room B

What's a Rule?

1:00 – 2:30 p.m. Williamsburg Lodge Room B

This roundtable will discuss the legal and practical differences between substantive rules, interpretative rules, and policy statements. It also will explore the impact of various new statutes and executive orders on this term and the practical implications of the changes for the government and for regulated entities.

Moderator: Neil Eisner, U.S. Department of Transportation, Washington, DC

Panelists:

- ◆ Daniel Cohen, U.S. Department of Commerce, Washington, DC
- ◆ Barry Felrice, DaimlerChrysler Corporation, Washington, DC
- ◆ Katie Kunzer, Chemical Manufacturers Association, Arlington, VA
- ◆ Peter Strauss, Columbia University School of Law, New York, NY

Government Accountability and Information Activities

2:40 – 3:55 p.m. Williamsburg Lodge Room B

Public policy analysts have urged regulators to increase use of information disclosure as a tool of regulation. The Internet enhances the potential for such strategies. However, greater availability of information magnifies the potential for harm if disclosure is used in an inappropriate manner. This program will explore the impact of the Internet on governmental information disclosure and whether additional procedural protections should be instituted.

Panelists:

- ◆ Mark Greenwood, Ropes & Gray, Washington, DC
- ◆ Jonathan Z. Cannon, University of Virginia School of Law, Charlottesville, VA
- ◆ Mary L. Lyndon, St. John's University, Jamaica, NY

Trading on the Net: Securities Regulation in Internet Time

4:00 – 5:30 p.m. Williamsburg Lodge Room B

The explosive growth of the Internet and its capabilities for securities trading have made securities markets more widely available and have created special challenges for regulators of those markets. This panel will discuss how federal, state, and self-regulatory organizations are adapting their administrative practices and enforcement decisionmaking to meet the special challenges of Internet securities regulation.

Panelists:

- ◆ Jonathan J. Rusch, Fraud Section, Criminal Division, U.S. Department of Justice, Washington, DC:
- ◆ John Reed Stark, Securities and Exchange Commission, Washington, DC
- ◆ Cameron Funkhouser, NASDR, Washington, DC:
- ◆ Philip Rutledge, Pennsylvania Securities Commission, Harrisburg, PA

Reception

5:45 – 7:00 p.m. Tazewell Courtyard

Dine-Around in Colonial Taverns

7:15 p.m. Colonial Taverns

For those who wish, reservations will be made in groups of 18 to 19 to dine at one of three taverns of Colonial Williamsburg, such as the King's Arms Tavern, Shields Tavern, and Christiana Campbell's Tavern. Guests can choose from the Tavern menu, and will have a choice of wine or beer, for a fixed price.

Saturday, April 29

Publications Committee Meeting

7:30 – 9:00 a.m. Williamsburg Lodge Room A

Spouse / Guest Continental Breakfast

9:00 – 10:00 a.m. Williamsburg Lodge Room B

Council Breakfast

8:00 – 9:00 a.m. Williamsburg Lodge Room DEF

Council Meeting

9:00 – 10:30 a.m. Williamsburg Lodge Room DEF

Project to Review the Administrative Procedure Act

10:30 a.m. – 12 noon Williamsburg Lodge Room DEF

The reporters on Rulemaking will discuss their preliminary draft. The audience will be asked to participate in the draft review process.

Moderator: Paul Verkuil, Benjamin N. Cardozo School of Law, New York, NY

Panelists:

- *Thomas McGarity*, University of Texas School of Law at Austin, Austin, TX
 - *Jeffrey Lubbers*, Washington College of Law, Washington, DC
 - *Peter Strauss*, Columbia University School of Law, New York, NY
-

SATURDAY AFTERNOON ACTIVITIES

Golf Outing

Eight golf tee times are available Saturday afternoon on the Golden Horseshoe Golf Course, a Robert Trent Jones, Sr. designed course. The tee times are from 1:50 – 2:00 p.m. Tickets are offered on a first-come, first served basis. \$105 for green fees and cart is due to Colonial Williamsburg Hotels on the day of play; alternatively, the fees can be charged to your room.

Round Robin Tennis Tournament

Two tennis courts are available on the outdoor courts of the Williamsburg Inn. Play will begin promptly at 1:30 p.m. Tickets are limited and are offered on a first-come, first served basis. Please note that a court fee is due to Colonial Williamsburg Resort Hotels on the day of play; alternatively, fees can be charged to your room. Please contact Section staff for court fees.

Reception / Dinner

7:00 p.m. Williamsburg Lodge West Terrace

A cocktail reception and dinner will take place on the West Terrace of the Williamsburg Lodge if the weather permits, or indoors if the weather is inclement. Our after dinner speaker will be Michael A. Haas, who will give a presentation on Virginia colonial legal history.

Sunday, April 30

Spouse / Guest Continental Breakfast

9:00 – 10:00 a.m. . Williamsburg Lodge Room A

Section Continental Breakfast

8:00 – 9:00 a.m. . Williamsburg Lodge Room DEF

Council Meeting

9:00 – 10:30 a.m. Williamsburg Lodge Room DEF

Project to Review the Administrative Procedure Act

10:30 a.m. – 12 noon Williamsburg Lodge Room DEF

The reporters on Access to Judicial Review will discuss their preliminary draft. The audience will be asked to participate in the draft review process.

Moderator: Paul Verkuil, Benjamin N. Cardozo School of Law, New York, NY

Panelists:

- *Harold Bruff*, University of Colorado School of Law, Boulder, CO
 - *Cynthia Farina*, Cornell University Law School, Ithaca, NY
-

Hotel Information

Williamsburg Lodge
310 South England Street
Williamsburg, VA 23185
Telephone: 800-229-1000
Guest Fax: 757-220-7790
Room Rates: \$235 (Tazewell)
\$175 (Main / South)

Williamsburg Inn
136 East Francis Street
Williamsburg, VA 23185
Telephone: 800-229-1000
Guest Fax: 757-220-7096
Room Rate: \$375

Williamsburg Woodlands
102 Visitor's Center Drive
Williamsburg VA 23185
Telephone: 800-229-1000
Guest Fax: 757-565-8942
Room Rate: \$110

The Inn and the Lodge, where most Section activities will be held, are south of the historic area. The Woodlands is north of the historic area, adjacent to the Visitors Center. To make reservations at these Williamsburg Hotels please contact Section Staff to receive a copy of the Hotel Reservation Form. The ABA block of rooms will be held only until **Monday, March 27**. After this date, guest rooms and rates are subject to availability.

Historic Area Passes

General Admission tickets to Colonial Williamsburg include admission to all ticketed sites, museums, and daytime programs (except History Walks). The tickets cost \$30 and are valid for the entire weekend.

Advanced Registration and Ticketed Events

Please complete the registration form at the end of the brochure and mail it with your check made payable to the American Bar Association (ABA). Credit card registrations may be faxed to (202) 662-1529. Advanced registrations must be received by **Monday, April 3, 2000**, to be included in the pre-registration list distributed at the program.

Continuing Legal Education Credits

Accreditation for all educational programs has been requested from all states with mandatory continuing legal education requirements. For more specific information about MCLE credit for the Spring Meeting, please call the ABA's MCLE office at (312) 988-6217.

Airline Information

For rate information or to make reservations attendees should contact the airlines directly using the ABA reference number.

- American Airlines 800-433-1790, ABA # S11803;
- Delta Air Lines 800-241-6760, ABA # DMN133970A;
- US Airways 877-874-7687, ABA #21900057;
- Or contact the ABA Travel Agency, Tower Travel at 1-800-921-9190

2000 Spring Meeting Registration Form

Registration must be received by **Friday, April 7**, so that your name may be included in the pre-registration list given to all attendees. Please complete this form and mail it with your check to the address below. Credit card registrations may be faxed to (202) 662-1529.

Registrant Information

Name: _____
(as you wish it to appear on your badge)

Affiliation: _____

Address: _____

City _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

Please check all programs/activities you wish to attend

Friday, April 28

Historic Area Pass \$30

What's a Rule? \$10

Government Accountability and Information Activities \$10

Trading on the Net: Securities Regulation in Internet Time \$10

Reception at Tazewell Courtyard \$35

Dine – Around in Colonial Taverns \$60

Saturday, April 29

Spouse / Guest Continental Breakfast No Charge

I plan to attend the Saturday Council Meeting No Charge

Project to Review the Administrative Procedure Act No Charge

Section Golf Outing \$105 Fee due day of play

Round Robin Tennis Tournament Fee due day of play Section Reception and Dinner \$80

Sunday, April 30

Spouse / Guest Continental Breakfast No Charge

I plan to attend the Sunday Council Meeting No Charge

Project to Review the Administrative Procedure Act No Charge

Total \$ _____

Cancellations: Ticket refunds will be honored up to 72 hours preceding the event.

Method of Payment

Check (made payable to the ABA)

Visa

MasterCard

American Express

Card Number: _____ Exp. Date: _____

Signature: _____

Mail to: ABA, Section of Administrative Law and Regulatory Practice, 2000 Spring Meeting, 740
15th Street, NW, Washington, DC 20005-1022, Telephone: (202) 662-1528 Fax: (202) 662-1529.

News from the States

by Michael Asimow*

Illinois upholds administrative adjudication of parking tickets and vehicle impoundments¹

Recently, many state and local governments have transferred a variety of law enforcement disputes from the criminal law system to an administrative adjudication system. Illinois has pioneered this trend. In *Van Harken v. City of Chicago*, 713 N.E.2d 754 (1999), the Illinois Appellate Court upheld Chicago's parking ticket adjudication hearing system under the state constitution. It ruled that an administrative agency could exercise adjudicatory functions without violating separation of powers as long as such exercise is subject to judicial review. Moreover, due process is not offended by the fact that a hearing officer may ask questions of the respondent. This decision echoed a previous case upholding the system under the federal constitution. *Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997), cert. denied 520 U.S. 1241 (1997).

Similarly, in *People v. Jaudon*, Slip Opinion 1-97-0046 (Sept. 7, 1999), the Illinois Appellate Court upheld Chicago's administrative adjudication system relating to vehicle impoundments. A vehicle can be impounded if it contains an unregistered firearm; illegal fireworks or narcotics; is furthering a public nuisance, such as the playing of loud music; or is used in the solicitation of a prostitute. Registered owners may retrieve their vehicle by posting a \$500 bond and by paying tow and storage fees and may request a hearing to contest the validity of the impoundment. In *Jaudon*, the court held that double jeopardy is not offended by combining a civil vehicle impoundment action and a criminal weapons prosecution. Again, a federal court had previously upheld the impoundment adjudication system. *Tower v. City of Chicago*, 173 F.3d 619 (7th Cir. 1999), cert. denied (1999).

Chicago has a central panel of ALJs (even though Illinois does not). Central panel ALJs provided the hearings in both parking ticket and impoundment cases.

* Professor of Law, UCLA Law School; Co-Chair, State Administrative Law; Co-Reporter for Adjudication, APA Project.

¹The information in this article was provided by Matthew W. Beaudet, Assistant Director, Chicago Department of Administrative Hearings.

Ohio Allows Dental Board Staff to Choose Attorneys as Hearing Officers Contrary to California Decision Currently before the California Supreme Court²

A dentist facing disciplinary charges before the Ohio State Dental Board challenged the Board's practice in appointing hearing examiners. The Board's executive director chooses attorneys in private practice to serve as examiners. The attorneys are paid by the hour. The federal court found that abstention from interfering in a pending state proceeding was inappropriate where there is a claim of impermissible bias. However, the court found that this practice does not, in itself, create a biased adjudicator. *DiMichaelangelo v. Ohio State Dental Board*, No. C2-00-044 (S.D. Ohio 2/1/00) (order denying preliminary injunction).

Interestingly, a lower California court recently held to the contrary. *Haas v. County of San Bernardino*, 81 Cal.Rptr. 2d 900 (1999), held that a licensee's due process rights are violated when the attorney representing the government chooses the hearing officer. The California Supreme Court has granted a hearing in this case so the Court of Appeal's decision has been vacated (and cannot be officially cited).

New Mexico Moves Toward Uniform Rules for Appeal of Administrative Actions³

In New Mexico, a series of legislative enactments and judicial rulemakings over the past few years have brought some uniformity to the process of appealing administrative actions to the courts. The state APA applies to virtually no agency, and as a result, there is no uniformity of administrative procedures in New Mexico. In 1998 and 1999, the Legislature enacted and amended a separate statute (NMSA Section 39-3-1.1) that establishes the basic process for appealing an administrative action to the district court. Concurrently, in over 100 other statutes (including the APA), specific administrative appeal provisions were repealed and replaced with a cross-reference to Section 39-3-1.1. Most state and local administrative actions are covered by the new statute, but certain administrative actions (e.g., tax, environmental) are

continued on page 17

²The information in this article was provided by Christopher B. McNeil, Administrative Hearing Examiner, State of Ohio.

³The information in this article was supplied by William R. Brancard, Chair, Public Law Section, New Mexico Bar Ass'n.

Recent Articles of Interest

Matthew D. Adler and Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L. J. 165 (1999). This article analyzes cost-benefit analysis from legal, economic, and philosophical perspectives. The traditional defense of cost-benefit analysis is that it maximizes a social welfare function that aggregates unweighted and unrestricted preferences. The authors follow many economists and philosophers who conclude that this defense is not persuasive. Cost-benefit analysis unavoidably depends on controversial distributive judgments, and the view that the government should maximize the satisfaction of unrestricted preferences is not plausible. However, the authors disagree with critics who argue that cost-benefit analysis produces morally irrelevant evaluations of projects and should be abandoned. On the contrary, they conclude that cost-benefit analysis, suitably constrained, is consistent with a broad array of appealing normative commitments and is superior to alternative methods of project evaluation. It is a reasonable means to the end of maximizing overall welfare when preferences are undistorted or can be reconstructed. And it both exploits the benefits of agency specialization and constrains agencies that might otherwise evaluate projects improperly.

Daniel H. Cole and Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 1999 WIS. L. REV. 887. According to Professors Cole and Grossman, contrary to the conventional wisdom among economists and legal scholars, command-and-control (CAC) environmental regulations are not inherently inefficient or invariably less efficient than alternative "economic" instruments (EI). In fact, CAC regimes can be and have been efficient (producing net social benefits), even more efficient in some cases than alternative EI regimes. Standard economic accounts of CAC are insensitive to the historical, technological, and institutional contexts that can influence (and sometimes determine) the efficiency of alternative regulatory regimes. A regime that is nominally or relatively efficient in one set of circumstances may be nominally or relatively inefficient in another. In some cases, given the marginal costs of pollution control, technological constraints, and existing institutions, CAC can be the most efficient means of achieving a society's environmental protection goals. This article reviews the empirical

literature on environmental regulation and finds that CAC is not inherently inefficient or invariably less efficient than EI. In addition, the article elaborates a model through five stylized cases, which demonstrate how alternative approaches to environmental regulation are more or less efficient depending on institutional and technological factors that affect overall regulatory costs. Finally, the model is empirically supported by a detailed history of the U.S. Clean Air Act's regulatory regime. Viewed as an evolutionary process, occurring within an institutional and technological framework, it was (nominally and relatively) efficient for Congress to rely, in the early years of federal air pollution control, on CAC regulations and then in more recent years to begin experimenting with efficiency-enhancing EI.

Harold J. Krent and Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705 (1999). Each year the government sells or leases assets worth billions of dollars. The impact on the economy is staggering. FCC auctions to allocate rights to electromagnetic spectrum generated well over twenty billion dollars in the last three years. Proceeds from mineral leases, timber sales, and disposition of real estate from defaulting thrifts have generated another several billion dollars annually. From the taxpayer's perspective, however, government disposition schemes have failed miserably. The government has donated valuable resources to preferred claimants, allocated scarce broadcast and oil rights resources by lottery, and sold both public land and rights to minerals beneath to private parties at a fraction of the market price. The government has also sold timber without any apparent cost-benefit justification, and awarded rights to use electromagnetic spectrum worth billions of dollars to communications giants at a substantial discount. In this article, the authors analyze the different causes for regulatory failure — historical, conceptual, and political — and argue that reforms at both the congressional and administrative level are needed to minimize the inefficiency and graft.

Mary K. Olson, *Agency Rulemaking, Political Influences, Regulation, and Industry Compliance*, 15 J.L. ECON. & ORG. 573 (1999). This article empirically examines the impact of congressional oversight and agency rulemaking on firm compliance

behavior in FDA-regulated industries. Congressional oversight hearings provide signals to firms about future changes in regulatory enforcement strategies. Agency rulemaking influences firms' incentives to comply with regulation because firms must invest significant resources to keep up with changing agency policy. This analysis uses three-stage least squares to simultaneously estimate both the numbers of FDA inspections and industry violators between 1972-94. Results show that congressional oversight deters industry noncompliance. The effect of agency rulemaking on noncompliance differs between industries. For instance, an increasing stock of human drug rules has raised compliance among drug firms because newer more, cost-effective rules have replaced older, more costly rules. In contrast, the increasing stock of medical device rules has reduced industry compliance among device firms because these rules have increased the complexity and the scope of regulation.

Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederal Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999). This article applies comparative institutional analysis to separation of powers under state constitutions, with a particular focus on the nondelegation doctrine and states' acceptance of Chadha-like restrictions on legislative oversight. The Article begins by contrasting state and federal doctrine and enforcement levels in each of these separation of powers contexts. Most state courts, unlike their federal counterparts, adhere to a strong nondelegation doctrine. In addition, many states accept (de facto if not de jure) even more explicit and sweeping legislative vetoes than the federal system. The article highlights the contrast of federal and state approaches by identifying their similarity with Federalist and Antifederalist separation of powers principles, respectively. Once the contrast is drawn, the article develops a descriptive explanation for this divergence in jurisprudential approach. After discussing the pitfalls of common American heritage, textualism, and culture-based approaches to interpreting separation of powers in state constitutionalism, the article presents institutional analysis as a better explanation for divergences in interpretive approach. Specifically, the article discusses institutional design in the legislative and executive branches of states and its interrelationship with faction and capture of the agency decisionmaking process. Attention to institutional design can explain adherence to the nondelegation doctrine in many states, and can also explain the explicit and sweeping presence of legislative vetoes in some

states. In addition, attention to institutional design features and their interrelationship with faction in the decisionmaking process can help to shed light on doctrinal nuances of state court approaches to upholding and striking certain delegations, such as delegations to private boards and to federal agencies. Thus, an appreciation of the role of institutional design is a necessary predicate to the development of an independent state theory of separation of powers.

Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?* 98 MICH. L. REV. 303 (1999). This article argues (1) against revival of the nondelegation doctrine, and (2) in favor of a kind of "democracy-forcing minimalism" for administrative law. As against a prominent recent trend in the DC Circuit, it claims that the nondelegation doctrine should be reserved only for the most egregious cases and that its appropriate use is in tools of statutory construction and certain "nondelegation canons." The Clean Air Act is constitutional because it sets floors and ceilings on agency action. But in issuing ambient air quality standards, the EPA should be required to compare the chosen standard with at least two alternatives, one more stringent and one less stringent; it should quantify the benefits of the three options, to the extent feasible; and it should explain why the chosen alternative is preferable in terms of the "residual risk." Reviewing courts should require the EPA to perform this task, usually by "remanding without invalidating" inadequately justified air quality regulations.

Otto H. Swank, Wilko Letterie, and Hendrik P. van Dalen, *A Theory of Policy Advice*, 15 J.L. ECON. & ORG. 602 (1999). This paper analyzes a model of the policy decision process in ministerial governments. A spending minister and a finance minister are involved in making a decision concerning a public project. The two ministers have partially conflicting preferences. Policy decisions are made in two stages. In the first stage, the spending minister consults a technical expert to obtain information about the technical consequences of the project. If the technical consequences are favorable, in the second stage the finance minister consults a financial expert to obtain information about the financial consequences. The finance minister can veto a proposal for undertaking the project. This paper illustrates the consequences of specialization for information transmission. A drawback of specialization is that projects are evaluated on the basis of their individual consequences rather than on the basis of their total consequences. ◆

News from the States *continued from page 14*

still appealed directly to the state Court of Appeals.

To appeal an administrative action to the state district courts, one must follow both the general procedures in Section 39-3-1.1 and the specific procedures in the newly promulgated New Mexico Supreme Court Rules 1-074, 1-075, 12-505 and 12-608. Most of the procedures follow traditional standards for appeals of administrative actions (e.g., whole record review; arbitrary, capricious, not in accordance with law standard, etc.), but a few new twists have been added. In the streamlined District Court proceeding, the parties are only allowed to file a "statement of appellate issues" which includes an argument not to exceed 8 pages. Additional briefing or oral argument is only allowed upon leave of the court.

The right to appeal an administrative case from the District Court to the Court of Appeals has been replaced by a writ of certiorari process. However, the District Court can now certify an administrative appeal directly to the Court of Appeals if the appeal involves an issue of substantial public interest.

The National Association of Administrative Law Judges' (NAALJ) Annual Meeting⁴

The National Association of Administrative Law Judges' (NAALJ) Annual Meeting for 2000 will be

⁴The information in this article was supplied by Administrative Law Judge Marc P. Zylberberg of New York.

held in Albany, New York, and is being co-sponsored by the New York State Administrative Law Judges Association (NYSALJA), the Government Law Center of Albany Law School, and the New York State Bar Association's Committee on Attorneys in Public Service. The conference theme of "Administrative Law in the New Millennium, Challenges and Opportunities," will surely pique the interests and attention of all attendees. The conference begins on Saturday October 14th and ends on Wednesday October 18th, 2000. The location for the Annual meeting is the Desmond, a one of a kind hotel, ideally located in the heart of New York State's Capital Region. If you have any questions, please contact Administrative Law Judge Marc P. Zylberberg at mpz01@health.state.ny.us or at (518-402-0748). The full brochure with registration form and more information will be mailed in March 2000.

State Administrative Law Articles

Cohen, Mark H. and David C. Will, *Administrative Law*, 51 MERCER L.REV.103 (1999).

This Article covers important developments in Georgia administrative law for the two-year period from June 1, 1997 through May 31, 1999.

Bonner, Charles, John Paul Jones, and Henry M. Kohnlein, *Administrative Procedure*, 33 U. RICH. L. REV. 727 (1999). This article discusses legislation from the 1999 term of the Virginia General Assembly and Virginia court decisions from 1998 through the first half of 1999. ◆

Council Capsules *continued from page 5*

desire to see the report discuss agency harmonization efforts to date to learn what works and what does not.

The chair asked the committee to make changes to the recommendation based on the council's discussion and put the redraft on the council listserv for further discussion at the spring meeting.

Council Defers Vote on Ombudsman Committee Recommendation

Sharan Levine, chair of the Ombudsman Committee, presented the committee's proposed recommendation for a resolution on the definition and role of ombudsmen. This session was a follow-up to the initial presentation at the 1999 spring meeting. Levine said that the committee feels that at this point the recommendation is pretty well set, while the report needs some more work.

Ron Cass asked what the ABA role was in rec-

ommending a resolution that seeks to dictate who should be considered an ombudsman not just within government agencies but within private entities, such as corporations and universities, as well. Stephen Calkins said he had trouble prohibiting a person from calling himself or herself an ombudsman simply because he or she did not meet this section's concept of what an ombudsman was, but he had no trouble issuing a set of "best practices" that the ABA could endorse as sound standards of conduct. Ron Levin agreed, suggesting the standards could and should apply even to "ersatz" ombudsman. Ernie Gellhorn advised the committee to trim the recommendation to a few short sentences that would refer to practices and standards detailed in an accompanying report. Section chair Young requested that the report clearly explain who prepared the recommendation and to whom it applies.

Levine will take the section's comments back to the committee, make revisions and present a modified recommendation and report at the spring meeting. ◆

“Issue Waiver” *continued from page 9*

opportunity to provide informed views.

An amicus brief on behalf of the AARP, the National Organization of Social Security Claimants’ Representatives (NOSSCR) and others, in support of Petitioner, argues against issue exhaustion in this context. The amici note that because of its limited resources, the Appeals Council provides no more than a cursory review to the vast majority of cases that come before it, that issue exhaustion is often futile since SSA refuses to allow its administrative appeals judges to apply controlling case law, that claimants have not received proper notice pursuant to the Due Process Clause regarding issue exhaustion, and that disabled claimants are likely to suffer harm if courts refuse to consider meritorious issues that have not been raised at the Appeals Council.

The futility argument is based on the manner in which SSA does, or does not, acquiesce in case law. The agency has long taken the position that it is not bound by any district court decision. Thus if counsel for a claimant asserted to the Appeals Council that the claimant was entitled to benefits based on a district court decision in the claimant’s own district, the Appeals Council could not and would not address that issue. So, why should the claimant be barred from raising that issue in the same district court if she failed to raise it to the Appeals Council, which as a matter of agency policy, would have been compelled to ignore it anyway? With regard to circuit court decisions, the issue is somewhat murkier. The agency takes the position that its personnel, including administrative appeals judges, cannot interpret circuit court precedent themselves. Rather the agency claims that it will issue “Acquiescence Rulings” within 120 days of a circuit court decision with which it disagrees, telling its personnel what the decision means and how and where to implement that decision. Then agency personnel can then apply the Acquiescence Ruling. Amici assert that, “SSA has been justly criticized both for taking a very limited view of when circuit court rulings conflict with its own interpretation and for failing to issue Acquiescence

Rulings in a timely fashion.” Thus in many instances it would be equally futile to assert arguments to the Appeals Council based on relevant circuit court precedent.

Currently the circuits are hopelessly split

There is no uniformity of approach among the courts in this area; currently the circuits are hopelessly split. Recently both the Seventh and Eighth Circuits have rejected issue waiver for issues not raised to the Appeals Council: *Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999), *Harwood v. Apfel*, 186 F.3d 1039 (8th Cir. 1999). As noted, the Fifth Circuit contends that it lacks jurisdiction to hear issues not raised to the Appeals Council. Other courts apply issue exhaustion, not on jurisdictional, but on prudential grounds. *Kendrick v. Sullivan*, 784 F. Supp. 94, 99 (S.D.N.Y. 1992).

The Fifth Circuit applies issue exhaustion blanketly. SSA says it will only raise issue exhaustion if the claimant was represented below. But if issue exhaustion goes to subject matter jurisdiction, surely SSA cannot waive it even for unrepresented claimants.

The Ninth Circuit applies yet another rule. Unlike SSA which would apply issue exhaustion if a claimant was represented below either by counsel or by a lay representative, the Ninth Circuit appears to apply the doctrine only in the former situation. *Meanel v. Apfel*, 172 F.3d 1111, 1115 (9th Cir. 1999). The Ninth Circuit also differs from the Fifth, Seventh, Eighth and Tenth by requiring that “appellants must raise issues at their administrative hearings in order to preserve them in this court.” (emphasis added) *Ibid*.

As spelled out in Petitioner’s brief, the circuits have also been at odds over the degree of specificity or precision with which issues must be raised below and whether SSA’s counsel’s failure to raise issue exhaustion in a timely fashion precludes application of the doctrine.

One can only hope that the Court will provide some clear guidance to claimants, representatives and the government, on these issues, which guidance is, as of now, woefully lacking. ◆

Supreme Court News *continued from page 7*

determine the legality of the practice.” While it has been said that mootness is “standing set in a time frame,” the Court noted that this saying cannot be technically accurate, because otherwise the

exception to mootness, when an unlawful activity is capable of repetition but evading review, could not exist. Even though an injunction had been denied and even though the defendant had closed the offending plant, the Court was unable to conclude that the case was moot, because civil penalties against the plaintiff could still deter it from future violations if it reopened the plant. ◆

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Member News

Professor **Howard Fenton** of Ohio Northern University College of Law has been appointed to the Mexico-U.S. NAFTA Chapter 19 Dispute Panel on High Fructose Corn Syrup. It is his fifth NAFTA panel. He continues to consult on administrative law reform in several republics of the former Soviet Union.

Professor **William Funk** of Lewis & Clark

News that you think should be shared with the Section should be sent to: Professor William Funk, Lewis & Clark Law School, Portland, OR 97219; FAX (503) 768-6671; E-mail: funk@lclark.edu. Items should be received not later than May 8.

Law School was elected to the Executive Committee of the Administrative Law Section of the Association of American Law Schools at its January Annual Meeting.

Chair-elect **Ron**

Levin has been named the Henry Hitchcock Professor of Law at Washington University School of Law at St. Louis. ▲

On-line Section Directory

The Section is pleased to announce that our Section membership directory is now available on-line. This directory is secured by our authentication process and *only* available to employees and members of the American Bar Association.

To access the Directory, visit the Section's website at www.abanet.org/adminlaw. At the bottom of the page there is a box entitled: Membership Directory. If you click on that box, you will be prompted for a User Name and a password. Your "User Name" is your 8-digit ABA ID number and your "Password" defaults to your last name. If you do not know your ABA ID Number or have changed your default password and have forgotten it, please contact the ABA Service Center at 1-800-285-2221 or abasvctr@abanet.org.

This tool is designed to provide detailed results when searching by last name, city and/or state. However, a general alphabetical search can also be conducted to produce a listing of several members at a time. E-mail links from your search results will facilitate communication with other members.

Once you access our Section's directory, please review your information to ensure that your information is correct. If your information needs to be updated, address change requests can be submitted directly on-line by clicking on the appropriate link.

You have the option to not have your name listed in the on-line display. To remove your name from the online directory, check the box above your individual listing asking if you would like to remove your name from the directory. ▲

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