

Recent Developments in  
Administrative Law  
and  
Alternative Dispute Resolution

CAROLINA ACADEMIC PRESS  
GLOBAL PAPERS SERIES

*Edited by*  
*Russell L. Weaver and Steven I. Friedland*

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Recent Developments in  
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GLOBAL PAPERS SERIES  
VOLUME I

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CAROLINA ACADEMIC PRESS  
Durham, North Carolina

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**Library of Congress Cataloging-in-Publication Data**

Administrative Law Discussion Forum (8th : 2013 : Louisville, Ky.)

Recent developments in administrative law and alternative dispute resolution  
/ edited by Russell L. Weaver, Steven I. Friedland.

pages cm. -- (The global papers series ; volume I)

“On December 5, 2013, the University of Alabama School of Law, the University of Luxembourg Faculty of Law, the University of Aix-Marseille Faculty of Law, the Emory University School of Law, and the University of Louisville's Brandeis School of Law hosted the eighth Administrative Law Discussion Forum at the University of Louisville.”

Includes bibliographical references and index.

ISBN 978-1-61163-143-2 (alk. paper)

1. Administrative law--Congresses. I. Weaver, Russell L., 1952- editor. II. Friedland, Steven I. III. Title.

K3400.A6A36 2015

342'.06--dc23

2014049842

Carolina Academic Press  
700 Kent Street  
Durham, NC 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

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## Series Note

The Global Papers Series involves publications of papers by nationally and internationally prominent legal scholars on a variety of important legal topics, including administrative law, freedom of expression, defamation and criminal law. The books in this series present the work of scholars from different nations who bring diverse perspectives to the issues under discussion.



Russell L. Weaver\*  
Steven I. Friedland†

## Introduction: Eighth Administrative Law Discussion Forum

On December 5, 2013, the University of Alabama School of Law, the University of Luxembourg Faculty of Law, the University of Aix-Marseille Faculty of Law, the Emory University School of Law, and the University of Louisville's Brandeis School of Law hosted the eighth Administrative Law Discussion Forum at the University of Louisville.

The purpose of the forum was to bring together a small group of prominent administrative scholars to discuss matters of common interest. For this forum, there were two topics. First, if they wished, participants could focus on recent administrative decisions or developments from their own country or region (e.g., US Supreme Court or EU decisions or administrative actions). Second, they could write about developments in alternative dispute resolution in the administrative context. The papers published here were submitted to the forum as "discussion papers," and they provide a rich and broad array of perspectives on the important administrative law issues of the day.

Two articles addressed the alternative dispute resolution topic. Professor Edward Rubin's article, *Settlement, Alternative Dispute Resolution and the Public Interest: Reconsiderations in Light of SEC v. Citigroup*, focuses on how ADR and settlement mechanisms have been used in the administrative context. It explores some of the implications of these mechanisms by considering a recent, highly controversial case, *SEC v. Citigroup*, in which Judge Jed Rakoff rejected the SEC's settlement of an enforcement action against a financial insti-

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tution on the grounds that the settlement's terms were not in the public interest. Professor Wolfgang Weiss' article, *Alternative Dispute Resolution in the Administration of the European Union Internal Market*, focused on how alternative dispute resolution methods have been employed in the administration of the European Union's internal markets. The article argues that the EU would have been unable to create a uniform market without rules designed to ensure implementation, and shows how alternative dispute resolution methods helped the EU achieve that objective.

The interplay of administrative procedures and substantive law was touched on by several authors. Professor Indra Spiecker offers an insightful article entitled *Some Thoughts on the Effects of Administrative Procedure on Substantive Law*. The article examines the relationship between substantive law and procedural law, and suggests that the line of demarcation between substance and procedure is not always clear-cut. Indeed, as agencies work to improve their procedures (through, for example, creating enhanced lines of communication and thereby encouraging increased acceptance of agency action), procedure can affect substantive outcomes. Professor Louis Virelli's article, *A Policymaking Interest in Administrative Abstention*, focuses on the abstention doctrine, and suggests broadening its application to administrative institutions. In particular, he contends that courts should expand their definition of state interests in the abstention context to include the state's "policymaking interest" — its interest in preserving the integrity of its administrative institutions.

Other articles also focused on the relationship between substance and procedure. For example, Professor Gabriel Bocksang Hola of Chile, in his article *The Chilean Rule of Law Threatened by Contra Legem Hermeneutics*, suggests that Chile's adherence to the rule of law is under threat. The article traces the history of Chilean constitutional and administrative law, and shows how recent judicial decisions have threatened the rule of law in the administrative context. He argues for reinstatement of the "Golden Rule of Chilean Public Law." Professor William Araiza's *Another Article About Standing: Clapper v. Amnesty International, Probabilistic Injury, and Judicial Review of Newer Styles of Regulation* examines the U.S. Supreme Court's decision in *Clapper v. Amnesty International USA*.<sup>1</sup> He addresses the question of whether individuals can establish standing for so-called "probabilistic injury" of the sort that often arises in modern regulatory contexts. Last, but not least, in this group is Professor Linda Jellum's *Codifying the Judicially Crafted Economic Substance Doctrine*, which describes the economic substance doctrine and its inclusion

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1. 133 S. Ct. 1138 (2013).

in the Affordable Care Act. The article then raises questions about how the doctrine will be applied.

Professor Edward Richards' article, *Should Federal Agencies Be Legally Liable for Catastrophic Coastal Flooding?*, raises issues regarding whether administrative agencies should be held liable for catastrophic flooding. He suggests that governmental constructs, such as levees, are not fool-proof, and that "[under] the Flood Control Act: [ ] flood control is, at best, a zero sum game in which you trade off frequent low level floods for infrequent catastrophic floods, and floods in one place for floods in another." He argues that the primary remedy for catastrophic floods should be political rather than judicial.

Two papers focused on the war on terror and its implications for the administrative process. Professor Francois Lichere of France also focuses on standing in his article *Judicial Review Versus Damages in European Union Law: From the "War on Terror" to the "Law of Terror."* However, it focuses on that issue in the context of "freezing orders" (orders freezing the assets of individuals), and examines whether an individual retains standing to challenge an order after he has been removed from a list of potential terrorists. Professor Weaver's article, *Governmental Transparency and the War on Terror*, focuses on the U.S. National Security Agency's (NSA) surveillance and data collection program, and inquires whether the program is consistent with the traditions of a free and democratic society. The article uses the *Clapper* decision to show how the government uses doctrines like standing to withhold information from the public, and thereby thwarts efforts to make its surveillance programs more open and transparent.

All told, the articles in this book provide an engaging and highly relevant review of the Administrative Law landscape, and are likely to surprise and challenge you.

