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For more information, visit study and commission websites. DLS staff members maintain comprehensive study and commission websites that contain complete summaries of meetings and links to additional information, handouts, and resources.

Administrative Law Advisory Committee

May 11, 2011

The Administrative Law Advisory Committee (ALAC) held its first meeting of the 2011 interim in Richmond with Chris Nolen, chair, presiding. ALAC provides recommendations to the Virginia Code Commission on regulatory issues. Mr. Nolen informed committee members that the work plan agenda for the coming year had not yet determined and that members should notify him if they have issues for ALAC to take up for the coming year. The meeting was an initial discussion regarding items that have come up in practice, and the ALAC chair will follow up with the chair of the Code Commission in order to decide whether ALAC is the appropriate venue to consider those topics.

Volkswagen of America, Inc. v. Smit Work Group

Mike Quinan, Work Group Member

Mr. Quinan reminded the committee of its discussion of the *Volkswagen* case at the previous meeting and that the case was denied certiorari by the U.S. Supreme Court. The case addresses Department of Motor Vehicles (DMV) regulations that use language similar to language found in the *Code of Virginia*.

When motor vehicle manufacturers are allocating vehicles to dealerships, they have to allocate in a way that is equitably related to vehicle importation. In the *Volkswagen* case, a dealer complained he could not get any new, in-demand Volkswagens at a particular time. The DMV said that was equitable under the statute. The Virginia Supreme Court found the statute was not unconstitutional on its face, but was unconstitutional as applied. The most significant point is that the court noted the agency was empowered by the statute to

issue regulations, which could have illuminated the meaning of the words “equitably related.” The failure of the DMV to issue regulations was critical to the court’s finding that there was not sufficient guidance in the statute or the regulations to make the statute constitutional.

State agencies should issue regulations if they (i) are operating under statutes that have vague but common standards (e.g., “equitably,” “fairly,” “reasonably,” etc.), (ii) are empowered to issue regulations, and (iii) have not done so with a view toward how those standards are defined.

A discussion then followed about a memorandum to be sent to state agencies from ALAC. Mr. Quinan advised he would research to see if there were any further legal developments regarding the case.

Guidance Documents

ALAC’s chair noted that its proposed memorandum to state agencies references the Virginia Supreme Court’s decision that the agency could have provided guidance documents on the relevant *Code* section. He suggested the possibility of ALAC undertaking a review of guidance documents in general. In 1996, ALAC did a study related to defining guidance documents. A bill was introduced that defined guidance documents, and a much narrower definition was adopted. Guidance documents are promulgated and created by agencies, and they detail how those agencies will interpret state law.

It was explained that the Administrative Process Act (APA) requires agencies to file a list of currently filed guidance documents with the Registrar’s Office while an executive order requires agencies to maintain a list of current guidance documents on Town Hall. The chair suggested that this is a topic that can be discussed at another time in the future.

Administrative Process Act

Lane Kneedler, Commissioner, Uniform Law Commission

Mr. Kneedler provided background information on the Uniform Law Commission (Commission), formerly known as the National Conference of Commissioners on Uniform State Laws.

Before each act is adopted, it appears for at least two readings after the drafting committee has completed its draft of the act. The Administrative Process Act (APA) came up for four readings, and each one involved a lengthy debate. The APA can be thought of as two acts: one that deals with administrative agencies in the judicial context, and another that deals with agencies in the legislative context. While there is some interrelationship between the two parts of the act, it is limited. Uniform acts go to the American Bar Association (ABA) for approval.

The Commission focuses on uniform acts, like the Uniform Commercial Code (UCC), and tries to reach out where there is a need for uniformity among the states. Sometimes the Commission will adopt model acts. There might be a motion for a model act rather than a uniform act when internal politics are involved, and the legislators may not want to impose a uniform act on their states. As a result, model acts are often given secondary status, but that was not the case with the APA. A decision was made years ago to create a model act and allow states to adopt the portions of it that are applicable to them. The act was revised in 1981, and again in 2010.

Mr. Kneedler explained that the APA has not yet been introduced anywhere in total. Several states are currently deciding whether they want to update their own administrative procedures. Now that each state has its own administrative act, the idea that states will completely change their administrative codes is not realistic.

Mr. Kneedler suggested that it might be appropriate to have a work group look more closely at the rulemaking, regulatory part of the APA, and another work group do the same for the adjudication part of the act. Within the act, there is an emphasis on judicial review and the provision of an administrative law panel. Requiring an administrative panel nationwide would have been met with resistance, so it was incorporated in the model act. He suggested a review of the administrative law panel and adjudicatory regulations section of the model act could be done by a third work group.

Mr. Kneedler described one of the projects ALAC undertook while he was a member, involving third-party contacts and whether or not they were permissible. There are no third-party contact rules in the legislative context. However, there was a dispute over what kind of contact should be permitted with administrative agencies as those members have a wider range of responsibilities. Mr. Kneedler explained that third-party contacts and the requirement of administrative law panels were, and still are, the most controversial parts of the act. The rest of the act does not have many differences between the model act and Virginia's version. Guidance documents are treated the same way in both acts. The way third-party contacts are treated is different between the two acts, and he suggested studying the differences further. Virginia's APA and the model act are conceptually the same with regard to rulemaking, but the model act allows more participation and opportunity for the public to initiate comments.

The chair advised members that part of the work plan for the coming year would be to study Virginia's APA and how it compares to the model act. Members will divide into two work groups, with one group focusing on the regulatory aspects of the acts, and the other focusing on the judicial aspects of the acts, with work completed by November to make recommendations to the Code Commission.

July 26, 2011

The chair welcomed members to the second meeting of the 2011 interim held in Richmond.

Volkswagen of America, Inc. v. Smit

Mike Quinan, *Volkswagen of America, Inc. v. Smit* Work Group Member

Mr. Quinan noted that he has updated the *Volkswagen* memorandum to reflect that no developments in the law have occurred since the decision was issued by the Virginia Supreme Court. ALAC will begin to coordinate dissemination of its memorandum to state agencies with the Office of the Attorney General through Elizabeth Andrews, ALAC member and Section Chief with the Office of the Attorney General.

ALAC members discussed the process by which executive branch agencies file guidance documents with the Registrar's Office and Town Hall.

Administrative Process Act

ALAC met to evaluate the Uniform Law Commission's Revised Model State Administrative Procedure Act (MSAPA) in relation to Virginia's current version of the Administrative Process Act (APA). The committee will determine whether it should recommend to the Code Commission any changes to Virginia's APA.

ALAC members discussed Article 6, which contains provisions governing central panel hearing agencies, referred to as the Office of Administrative Hearings. Under this article, contested case hearings are heard before administrative law judges from the central panel agency, rather than before administrative law judges from the agency whose case is being heard. This allows for separation of the hearing and decision-making authority, which, in theory, provides for greater fairness in hearings. Article 6 details the creation of the Office of Administrative Hearings; appointment, qualifications, and discipline for administrative law judges; powers, duties, and authority of administrative law judges; and the panel's interaction with agencies.

It was noted that a central panel hearing agency had been considered before by the General Assembly in the 1980s. One of the arguments against it was that the General Assembly had just created the Court of Appeals. That action was criticized as an expansion of government, and the addition of an agency to handle administrative appeals was argued to be more of the same. Opposition by state agencies and boards as well as their constituents was probably the most important reason the bill failed. The same reaction from legislators, agencies, and constituent groups could be expected today. It was suggested that ALAC should first determine whether there is a problem with Virginia's process that needs to be rectified. Financial considerations should also be taken into account when determining whether or not to create a new agency.

Another member explained that in Virginia, there are essentially two hearing systems for agencies: agencies that have hearing officers within the agency and a panel through the Virginia State Bar. Giving a central panel the sole authority to hear contested cases strips some power away from agencies, particularly agency heads and commissioners; this is likely to be the biggest argument against establishing a central panel. State Corporation Commission hearing officers operate fairly independently of staff, and are not the investigating officers.

Discussion ensued that included mention that heads of agencies want the power to make decisions and interpret their own agency's regulations. Hearing officers within agencies that oversee a professional field often have expertise that administrative law judges lack. It was also noted though that oftentimes the perception is that if the hearing officers are employed within the agency it is more difficult for them to be fair.

It was mentioned that in 2009 there were 185 requests to have hearing officers appointed to a central panel outside the state bar, and in 2010 there were 211 requests.

The chair acknowledged that discussion of the MSAPA prompts a review of Virginia's system and improvements that could be made to the APA. The committee previously agreed to update the hearing officers' handbooks periodically, and that necessarily includes discussing with hearing officers what would be helpful to include to allow for a more efficient system. Another member emphasized that although the MSAPA is a model act rather than a uniform act, it is still designed so that all the articles work together as a whole. The chair agreed and noted that the work groups will meet individually over the next few weeks to discuss each article individually and at the next full committee meeting the act in its entirety will be discussed.

Next Meeting

The Regulatory and Judicial Work Groups of the Administrative Law Advisory Committee met in August. The next meeting of the Regulatory Work Group will be September 14 and the next meeting of the Judicial Work Group will be September 21.

In Virginia, administrative hearings are held either before hearing officers within an agency or before a panel through the Virginia State Bar.

ADMINISTRATIVE LAW ADVISORY COMMITTEE

CHRISTOPHER NOLEN, CHAIR
ELIZABETH PALEN, DIRECTOR

910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804)786-3591

<http://codecommission.dls.virginia.gov/alac/ALAC.htm>

Dr. Martin Luther King, Jr. Memorial Commission

May 17, 2011

The Dr. Martin Luther King, Jr. Memorial Commission resumed its work after the 2011 Regular Session with a meeting in Arlington in May and in Richmond in June.

May 17, 1954
marks the date on
which the U.S.
Supreme Court ruled
segregated schools
unconstitutional.

Special Subcommittee on the 50th Anniversary of Public School Closings in Virginia

The Arlington Town Hall, the fourth in a series of meetings held in localities that closed public schools to avoid desegregation, was preceded by a joint business meeting of the Commission and its Partnership and Expenditure Review Subcommittee, Abraham Lincoln Bicentennial Subcommittee, and Special Subcommittee on the 50th Anniversary of Public School Closings in Virginia. The Town Hall was coordinated by the Commission with the Arlington County Board of Supervisors and school division officials as a part of the statewide commemoration that began in 2009 of the 50th anniversary of the closing of public schools (Massive Resistance) and the 55th anniversary of the historic 1954 *Brown v. Board of Education* decision. The Town Hall was designed to facilitate a public discussion concerning the history of Massive Resistance, its impact and legacy in Arlington County and the Commonwealth, and ways to promote reconciliation and a common vision for the future.

The Special Subcommittee, established by the Dr. Martin Luther King, Jr. Memorial Commission and the *Brown v. Board of Education* Scholarship Committee, includes legislative and citizen members of the King Commission and the *Brown* Committee, public and higher education officials, educators, recent *Brown* scholars, and representatives of the legal, business and corporate communities; the state and federal court systems; professional education organizations; relevant state agencies and local governing bodies; community organizations; and localities in which public schools were closed to avoid desegregation.

In 1959, after the U.S. Supreme Court's decision in *Brown*, Virginia embarked on a public policy of Massive Resistance in which public schools were closed in Charlottesville, Norfolk, Prince Edward County, and Warren

County, depriving thousands of school children of an education. In Arlington, state public education funds were rescinded because the county's public schools did not remain segregated. Although public schools were eventually re-opened in other areas of the Commonwealth, they remained closed in Prince Edward County for five years until the Supreme Court ordered the re-opening of the public schools in 1964. Despite the Supreme Court ruling in *Brown* that school segregation was unconstitutional, public schools in Virginia did not immediately begin to desegregate. The resistance lasted 10 years. After the formal end of Virginia's Massive Resistance, desegregation cases continued to be heard in federal courts until 1984, and the last case was finally dismissed in 2001.

Officials and other persons attending the Arlington Town Hall pointed out the historical significance of holding the public meeting on May 17, the date on which the U.S. Supreme Court ruled segregated schools unconstitutional in 1954. Attending the Arlington Town Hall were students; parents; representatives of the U.S. House of Representatives, the Arlington County Board of Supervisors, and the Arlington County School Board; and former faculty and students of the public schools during Massive Resistance in the county. Under the theme, *Massive Resistance: Learning from the Past, Living the Present, Taking Responsibility for the Future*, invited and other speakers described their experiences and difficult challenges as students, parents, teachers, administrators, and citizens during this period. Representatives of legal, media, and advocacy groups, and the faith community candidly shared their perspectives on the past, present, and legacy of Massive Resistance, prior to the open dialogue among attendees. Suggestions were offered to the Commission regarding:

- The need for high expectations and excellence in education for all students.
- A safety net that supports at-risk students.
- Strong and viable families and invested communities.
- A return to "what works."
- Forgiveness and rebuilding of mutual trust, racial reconciliation, and public policies that ensure equity and promote equality.

Although considerable social, economic, and racial gains have been made since Massive Resistance, Commission members were admonished to acknowledge that neither Virginia nor the American society has achieved

racial equality, racial discrimination is a reality, and many minority citizens have experienced a resurgence in racial intolerance and divisiveness in their communities and the public square.

A ceremony recognizing the former students who desegregated Arlington public schools on February 2, 1959, concluded the Town Hall.

June 20, 2011

Following a briefing by the staff, subcommittee reports were received.

Partnership and Expenditure Review Subcommittee

Dr. Kirk T. Schroder, Partnership and Expenditure Review Subcommittee Chair, reported that the Commission's partnerships with the Preservation of Northside High School Museum Committee, the Prince Edward County documentary production company, and Robert Russa Moton Museum Phase III have been completed. The Subcommittee recommended and the Commission approved continued collaborations with:

- The City of Petersburg for the completion of Lincoln in Petersburg Phase III.
- The African American Teaching Fellows' Lt. Col. John E. Baker Legacy Dinner.
- The College of William and Mary's *Remembering Slavery, Resistance, and Freedom*, Slave Burial Grounds Project.
- The Lincoln Society of Virginia for the preservation of the Lincoln Homestead in Rockingham County.

The Subcommittee also recommended that funding priority be given to the commemoration of the Sesquicentennial of the Emancipation Proclamation and proposed the development of a budget for the observance.

Abraham Lincoln Bicentennial Subcommittee: Emancipation Proclamation

Abraham Lincoln Bicentennial Subcommittee chair, Dr. Robert C. Vaughan, III, led the Commission's discussion and planning for the Sesquicentennial of the Emancipation Proclamation in 2013.

REMEMBERING SLAVERY, RESISTANCE, AND FREEDOM (SLAVE BURIAL GROUND/AFRICAN AMERICAN CEMETERY PROJECT)

Autumn Barrett, College of William and Mary

Ms. Barrett, from the College of William and Mary's Institute for Historical Biology, stated that a decision from the National Endowment for the Humanities concerning the College's grant request is expected in the fall. The College of William and Mary will provide leadership for the Commission's project to identify and authenticate slave burial grounds and old African American cemeteries throughout the Commonwealth for historical preservation and educational purposes and to memorialize African Americans who did not survive to witness freedom.

AFRICAN AMERICAN LEGISLATORS PROJECT AND EXHIBIT

Viola O. Baskerville, former Secretary of Administration and Subcommittee Citizen Member

This endeavor, presented by former Secretary of Administration Viola O. Baskerville, continues to develop the work initiated by the Commission during the 50th anniversary celebration of *Brown v. Board of Education* in 2004. Ms. Baskerville presented the research underway to identify each African American member of the Virginia General Assembly during Reconstruction and those who were members of the 1869 Constitutional Convention. Commission plans include an appropriate memorial and exhibit of the contributions of African American state legislators between 1864 and 1890 for the celebration of the 150th anniversary of the Emancipation Proclamation in 2013. As a citizen member of the Commission's Abraham Lincoln Bicentennial Subcommittee, Ms. Baskerville will work with staff to establish a database that will include all African American legislators ever elected to the Virginia General Assembly.

PRESERVATION OF THE LINCOLN HOMESTEAD

Through a partnership with the Lincoln Society of Virginia, efforts are continuing to preserve the Lincoln Homestead in Rockingham County, Abraham Lincoln's ancestral home and the burial site of his great-grandparents and multiple relatives. Lincoln's great-grandparents, grandparents, and parents lived in Virginia; his father was born in Virginia and his parents met, married, and lived for a time in the Shenandoah Valley. During the Civil

The Sesquicentennial of the Emancipation Proclamation will be commemorated in 2013.

War, Lincoln's family in Virginia owned slaves and were Confederates.

EMANCIPATION PROCLAMATION EXHIBIT

The Commission is working with the Virginia Historical Society and Hampton University to host an exhibit of the original Emancipation Proclamation document, the Lincoln Pen, and other Lincoln artifacts during 2013 as a part of the Sesquicentennial.

The documentary entitled "They Closed Our Schools" is in the final phases of production.

Special Subcommittee on the 50th Anniversary of Public School Closings

Plans for the Prince Edward County Town Hall on October 3, 2011, in Farmville were reviewed and discussed. It was agreed that the proposed driving tour be expanded to include as many relevant Farmville sites as possible. Staff was requested to work with Special Subcommittee members representing Prince Edward County to ensure the inclusion and participation of all relevant parties in the site visit and Town Hall.

Partnership Updates

BOOK AND DOCUMENTARY

Brian Grogan, Mercy Seat Films, Inc.

Status reports were made regarding the documentary and accompanying book, *They Closed Our Schools*. "The documentary is in its final phase of production; however, funding remains a challenge to the completion of the film," stated Mr. Grogan. The writing for the book is nearly complete and the publication release date will be announced.

DESEGREGATION OF VIRGINIA EDUCATION PROJECT

Sonia Yaco, Special Collections Librarian and University Archivist, Old Dominion University

In a written report to the Commission, Ms. Yaco reported that funds from the MLK/Desegregation of Virginia Education (DOVE) Project partnership were used to train approximately 65 DOVE regional taskforce members, university faculty, K-12 educators, librarians, archivists, and volunteers from the general public on the identification, preservation, and cataloguing of historical records, and to provide presentations in Norfolk, Petersburg, Arlington, Blacksburg, and Lexington. A unit of Old Dominion University Libraries, DOVE is a

statewide organization designed to identify, locate, and preserve records that document Virginia's school desegregation history.

Upcoming Events

The Commission agreed to participate in the following events:

- August 28, 2011, Martin Luther King, Jr. National Memorial Dedication, Washington, D.C.
- September 14-17, 2011, American Association of State and Local History Annual Conference, *Commemoration: The Promise of Remembrance and New Beginnings*, in Richmond.
- October 5-9, 2011, Association for the Study of African American Life and History Annual Conference, *African Americans and the Civil War*, in Richmond.
- October 28, 2011, MLK/African American Teaching Fellows' Lt. Col. John E. Baker Legacy Dinner, in Charlottesville.

Next Meeting

The Commission will meet again on October 3, 2011, in Farmville.

DR. MARTIN LUTHER KING, JR. MEMORIAL COMMISSION

SENATOR HENRY I. MARSH III, CHAIR
BRENDA EDWARDS, DLS STAFF

910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804)786-3591

<http://dls.virginia.gov/MLK.HTM>

Virginia Code Commission

July 18, 2011

Senator Edwards called the meeting to order and welcomed new members Robert L. Tavenner, Director of the Division of Legislative Services, and Jeffrey S. Palmore, who is the Governor's designee along with Jason E. Eige.

Foreword to the *Code of Virginia*

Mr. Moncure presented the final draft of the Foreword to the *Code of Virginia*, which will be printed in Volume 1 and distributed in September. Members approved the Forward with a change to include both Governor's designees in the membership listing.

Mail Notice Provisions in the *Code of Virginia*

Lisa Wallmeyer, Senior Attorney,
Division of Legislative Services

Lisa Wallmeyer spoke to the Commission about its request for legislation to expand mail delivery options when *Code* provisions require that delivery or written notice be given by U.S. postal mail. The two issues concern expanding the delivery options to include providing notice through email and commercial delivery services, such as Federal Express and UPS.

The proposed bill draft creates a statutory rule of construction that allows any written notice required by the *Code of Virginia* to be provided by any commercial delivery service or sent via email or other electronic means, regardless of method of delivery set forth in the statute. Electronic delivery of the notice may only be used with the consent of the recipient of the notice.

Email

Ms. Wallmeyer explained that Virginia adopted the Uniform Electronic Transactions Act (UETA) (§ 59.1-479 et seq. of the *Code of Virginia*). UETA provides that, where both parties agree, electronic means is acceptable for serving notice, unless a specific method of delivery is set forth. When the *Code* specifies a particular method of delivery, the specified limitations must be followed. As an example,

Ms. Wallmeyer stated that over 500 references requiring notice be given by certified mail appear in the *Code*. UETA does not override these provisions. In addition, Ms. Wallmeyer pointed out that certain important transactions, such as insurance cancellations, require hard copy form.

Based on its discussion, the Commission decided not to pursue the notice by email option.

Commercial Delivery Services

The Commission discussed whether commercial delivery is the qualitative equivalent of registered or certified mail. Although such change would be considered substantive, the Commission agreed that current *Code* provisions are outdated. A member commented that, as a matter of common practice, if a person used Federal Express as a method to ensure delivery, that person likely would be surprised and distressed to discover that this delivery method was insufficient for complying with the law.

Instead of setting out the provisions in a new section, Ms. Wallmeyer suggested adding a second rule to subsection B of § 1-206 providing that any notice required to be sent by U.S. mail (regular, certified, or registered) may, alternatively, be sent by a commercial delivery service that is registered with the State Corporation Commission.

A member commented that the issue is to ensure that a person is given fair notice and suggested adding language to ensure that a record of delivery exists for the initial delivery.

Ms. Wallmeyer will redraft the language and present it at the next meeting.

Recodification of Title 64.1 of the *Code of Virginia*

David Cotter, Senior Attorney, Division
of Legislative Services

David Cotter reported that he will begin presenting Subtitle III at the next meeting. The original plan for Subtitle III included moving the Health Care Decisions Act (Act) from Title 54.1 (Health Professions) into Title 64.2. Certain interested parties have raised objections to moving the provisions from Title 54.1 to Title 64.2. Although the interested parties agree that the Act is misplaced in Title 54.1, there is disagreement about where the provisions should be placed in the *Code*. The Code Commission agreed to exclude the Act from Title 64.2, but it will consider moving it to

The Virginia Code Commission discussed drafted legislation to expand mail delivery options when Code of Virginia provisions require delivery or written notice be given by U.S. postal mail.

The Virginia Code Commission is currently working on the recodification of Title 64.1 of the Code of Virginia.

another title, as appropriate, and welcomes input from the interested parties as to proper placement.

Mr. Cotter then presented proposed Subtitle IV, Provisions Applicable to Probate and Nonprobate Transfers, and stated that the majority of the changes in this subtitle are technical in nature. Subtitle IV consists of Chapters 23 (Uniform Simultaneous Death Act), 24 (Persons Presumed Dead), 25 (Conservators of Property of Absentees), 26 (Acts Barring Property Rights), 27 (Uniform Disclaimer of Property Interests Act), and 28 (Release of Powers of Appointment).

The Commission suggested an amendment to clarify language in subsection C of § 64.2-2404 regarding where to publish a notice that a petition has been filed seeking judicial determination that a person is dead.

The Commission will begin its review of Subtitle III, Fiduciaries and Guardians, at the September meeting. Also, a General Provisions chapter is under development and will be presented at a future meeting.

Other Business

Delegate LeMunyon reminded the Commission that it has not yet made a decision on which title to recodify next year. He indicated that Titles 33.1 and 15.2 had been brought to his attention as potential candidates. Other titles that have been mentioned are Titles 23 and 55. Mr. Tavenner will discuss the issue with appropriate DLS staff, and the Commission will revisit the issue at the September meeting.

Next Meeting

The next meeting of the Virginia Code Commission will be held on September 7, 2011, in Richmond.

VIRGINIA CODE COMMISSION

SENATOR JOHN S. EDWARDS, CHAIR
JANE CHAFFIN, DLS STAFF

910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804)786-3591

<http://codecommission.dls.virginia.gov/codehome.htm>

Did You Know?

“Did You Know?” appears in each issue of the *Virginia Legislative Record*. The article features important topics or interesting facts relevant to the Virginia legislature. For general questions or topic suggestions, please contact the Division at (804)786-3591 or email mtanner@dls.virginia.gov.

The Courts and Congressional Redistricting

Did you know that in 1932 all of the then nine Virginia members in the United States House of Representatives were elected from the state at-large? The Virginia Supreme Court ordered the at-large election after finding that the General Assembly’s 1932 redistricting effort failed to meet the Constitution of Virginia’s requirement that congressional districts contain “as near as practicable an equal number of inhabitants” (Section 55, 1902 Constitution of Virginia). That episode in Virginia’s political history comes to mind in view of the current legislative deadlock over congressional redistricting.

For more than a century after our national government was formed, Congress simply increased the size of the House of Representatives after each decennial census

rather than reapportioning seats among the states. By the early twentieth century, however, a few states began to lose representatives and small state-large state conflicts arose. As a result of growing disagreement, Congress failed to reapportion after the 1920 census. To avoid a 1930 repeat, Congress in 1929 passed a Permanent Apportionment Act that fixed the size of the House at the 1910 level of 435 and established a procedure, modified in 1941, for automatically reapportioning the seats after each census. Following the 1930 census, the formula reduced Virginia’s representation in the House from ten to nine.

The 1932 General Assembly’s redistricting effort was perfunctory. The plan simply combined two districts, except for moving a few counties to an adjoining district, and the other seven existing districts were not changed at all. Deviations ranged from minus 31.6 percent below ideal to plus 25.1 percent, for a total deviation range of 56.7 percent. Subsequently, Virginia

state election officials refused to accept notices of candidacy from several individuals who filed as candidates at large for the House of Representatives. The candidates, claiming that the reapportionment act failed to meet the population standards in federal law and in the Constitution of Virginia, petitioned the Court to order that members of Congress be elected at-large at the November 1932 election. The Supreme Court agreed with the plaintiffs and, less than four weeks before the November election date, ordered the at-large elections (*Brown v. Saunders*, 159 Va. 28). The resulting ballot included the names of more than two dozen candidates. The Democratic Party slate carried the day. Its nine candidates outdistanced the Republican slate by more than two to one and lead plaintiff William Moseley Brown by five to one. The only incumbent casualty was the lone Republican in the congressional delegation, Menalcus Lankford of Norfolk. The 1934 General Assembly drew new single-member districts that remained in effect until Virginia gained a tenth seat after the 1950 census.

1970 Census and Redistricting

Virginia revisited the courts in the congressional redistricting following the 1970 census. Plaintiffs asked the Virginia Supreme Court to order at-large congressional elections on the grounds that the districts in the General Assembly's 1971 plan did not meet the requirement of the Constitution of Virginia that districts consist of compact and contiguous territory. The Court, in a two paragraph opinion, denied the writ, citing a recent 1967 Act of Congress (see 2 USCS § 2c) that required that members of Congress be elected only from single-member districts (*Simpson v. Mahan*, 212 Va. 416). The Court did not address another federal statute (2 USCS § 2a(c)), enacted in 1941, that sets out the method of election in the event a state has not redistricted in the manner provided by law under several scenarios as to whether a state's representation has increased, decreased, or remained the same. (The various scenarios provide for elections from the existing districts, in some instances with one or more at-large seats, except that all representatives are elected at-large if the number of districts exceeds the number of representatives under the new decennial apportionment.) A federal district court subsequently held that the 1971 plan violated one person-one vote requirements, enjoined use of the plan, and retained jurisdiction until the General Assembly adopted a valid plan, which it did 10 days later.

The Virginia Supreme Court's application of the 1967 federal statute was in line with lower federal courts in the next few decades, and seemingly affirmed by the highest court (see, for example, *Shayer v. Kirkpatrick*, aff'd *sub nom. Schatzle v. Kirkpatrick* 102 S. Ct. 2228), namely that the 1967 statute had implicitly repealed the older § 2a(c). In 2003, the U.S. Supreme Court took up the

question directly in a case from Mississippi, *Branch v. Smith*, 123 S. Ct. 1429 (2003). The Court held unanimously that § 2c, the 1967 act requiring single-member districts, applied to court-drawn plans as well as legislative plans. What to make of the older § 2a(c) was another matter. Six of the nine justices took the position that 2c had not repealed § 2 a(c) by implication but were split on the question of how the two sections could work together. Justice Scalia, joined by three others, concluded that § 2a(c) was a "stopgap" measure to be used only in the last instance when there is in place no legal plan and an election is so imminent that a legislative plan cannot be completed without disrupting the election process. Justice O'Connor, joined by Justice Thomas, took a more expansive view, maintaining that there was no conflict between the older and newer federal statutes and that they should be read as sequential options. If a state has not adopted a redistricting plan, courts must follow the options set out in § 2 a(c). Thereafter, a court is controlled by § 2 c, that is, it can remedy a state plan only by drawing single-member districts.

Conclusion

So, is it established that courts, in fashioning congressional redistricting remedies, no longer can order at-large elections or use the other options of § 2a(c)? While the discussion in *Branch* certainly muddied the waters a bit, the answer almost certainly is in the affirmative. Justice Scalia himself acknowledged that most of the section was a "dead letter," rendered "in virtually all situations plainly unconstitutional" because of the Supreme Court's redistricting decisions since 1967. Apparently it was because the Mississippi situation, more existing districts than post-census apportionment seats because the state lost a seat, could still be addressed by § 2a(c)'s prescription of at-large elections for all seats that the Court engaged in its extended discussion.

Jack Austin, Manager, Special Projects Section

Virginia Freedom of Information Advisory Council

July 18, 2011

FOIA Council staff will conduct seven FOIA workshops across the Commonwealth.

The Freedom of Information Advisory Council (the Council) held its second quarterly meeting in Richmond. Senator Houck, chair, welcomed Delegate Sal R. Iaquinto, Robert L. Tavenner, Kathleen Dooley, and Stephanie Hamlett to the Council. Each new member was appointed to serve a four-year term. The Council then elected Delegate Iaquinto to serve as vice-chair.

Subcommittee Reports

Criminal Investigative Records Subcommittee

Craig Fifer, chair of the Criminal Investigative Records Subcommittee, reported that the Subcommittee held its first meeting earlier in the day. The purpose of the meeting was to study Senate Bill 1467, regarding access to criminal investigative records, and to consider a separate proposal concerning access to criminal and other law-enforcement records from the Virginia Press Association (VPA).

Mr. Fifer reported that Senator Edwards, the patron of the bill, was present. Senator Edwards noted that one reason he brought the bill was because there was inconsistency regarding what will be released by different law-enforcement agencies. While aware of the need for privacy in certain matters, Senator Edwards expressed that his experience was that many law-enforcement agencies would refuse to release records as a matter of policy to avoid improper application of discretion that might be perceived as biased or discriminatory. He further noted that the Freedom of Information Act (FOIA) already contains many other exemptions for information that would need to be protected in criminal investigative files that would still apply even after the investigation was over. Mr. Fifer told the Council that after considerable discussion, the Subcommittee recommended that no further action be taken on SB 1467. He noted, however, that the VPA had submitted a draft concerning access to criminal and other law-enforcement records, which was reviewed by the Subcommittee. Staff suggested that the Subcommittee work with the interested parties to try to frame the issues on which there was agreement as well as those where there was no

agreement. Staff will provide notice to all interested parties to ensure their participation in this informal facilitation process.

Personnel Records Subcommittee

Ed Jones, chair of the Personnel Records Subcommittee, advised the Council that the Subcommittee will hold its first meeting immediately following the Council meeting.

HB 1935

The Council next turned its attention to HB 1935—legal notices; use of websites, radio and television, etc. This bill was referred to the Council by the 2011 Session of the General Assembly and at the last Council meeting, Roger Wiley, a member of the Council whose term expired July 1, 2011, told the Council that while the issue of publication of legal notices was very important to local governments and citizens, it was his belief that it was not a FOIA issue and therefore not within the purview of the Council. Staff suggested that the Council, by letter, request the respective chairs of the Senate Committee on Local Government and the House Committee on Counties, Cities and Towns, to create an ad hoc joint subcommittee of both committees to examine the issues raised by HB 1935. By consensus, the Council agreed to this suggestion and directed staff to prepare the appropriate letters.

Other Business

As there was no public comment, staff briefed the Council on the upcoming 2011 FOIA Workshops. The statewide workshops will be held in seven locations, including two in Richmond. Senator Houck reminded all in attendance about the Council's annual legislative preview scheduled for the November 14, 2011, in Richmond and strongly encouraged any interested party to bring their legislative proposals (conceptual in nature or in draft form) before the Council so that any necessary work on the proposal, including preparing compromise language, may be accomplished before the press of the 2012 General Assembly Session. The purpose of the annual legislative preview is to air FOIA and related access issues before the Council and other interested parties, which issues will or may be the subject of legislation in the upcoming Session of the General Assembly.

Next Meeting

The next meeting of the Freedom of Information Advisory Council is scheduled for November 14, 2011, at 1:30 p.m., in House Room C of the General Assembly Building in Richmond.



**Virginia Freedom of Information
Advisory Council**

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

**SENATOR R. EDWARD HOUCK, CHAIR
MARIA EVERETT, EXECUTIVE DIRECTOR
ALAN GERNHARDT, DLS STAFF**

910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804) 786-3591

<http://dls.virginia.gov/foiacouncil.htm>

**Members of the House of
Delegates and Senate of Virginia
requesting multiple copies of the
Virginia Legislative Record
should contact the Division of
Legislative Services.**

Brown v. Board of Education Scholarship Committee

July 20, 2011

The *Brown v. Board of Education* Scholarship Committee (Committee) held its first meeting of the interim in Richmond.

Staff Briefing

The Committee reviewed and approved revisions to its policies to clarify certain provisions and provide consistency with the statute governing the *Brown* Scholarship Program. As revised, the policies:

- Clarify that the scholarship award is limited to the minimum number of credit hours required to complete the program requirements as verified by the institution.
- Specify the fees covered by the scholarship.
- Explain that the book allowance is designed to offset the costs of textbooks and required instructional materials and that it is prorated based upon the number of credit hours enrolled.
- Note that the summer term is considered a "trailer term," and scholarships are awarded beginning with the fall term.
- Stipulate that when a student withdraws from an approved education program, the Committee may require the student to reimburse the Commonwealth a portion of the book allowance or reduce a future book allowance award.

Staff reported that as of May 2011, 21 students have completed an undergraduate degree program since the inception of the *Brown* Scholarship Program in 2004. Other students have earned adult high school diplomas, GEDs, and career and technical certificates, and completed requirements for the two-year degree programs.

Lee Andes, Assistant Director of Financial Aid, State Council of Higher Education for Virginia

Ms. Andes reported that 24 students received awards during the 2010-2011 academic year totaling \$108,165. Of the 24 students awarded scholarships in 2010-2011, eight students attended Virginia community colleges, six were enrolled in undergraduate degree programs, and 10 were graduate students. Over

Since the inception of the *Brown* Scholarship Program, 21 students have completed an undergraduate degree program.

The *Brown v. Board of Education* Scholarship Committee will meet jointly with the Dr. Martin Luther King, Jr. Memorial Commission on October 3, 2011, in Farmville.

the course of the *Brown* Scholarship Program, 76 individual awards have been made for a total of approximately \$730,000.

In addition, to aid in notifying the public and potential applicants of the *Brown* Scholarship Program's existence, provisions, and requirements, the Committee directed staff to pursue the publication of a brochure previously discussed and approved as soon as possible.

Graduate and Professional Education

Staff related certain financial problems and difficulties experienced by *Brown* scholarship recipients enrolled in graduate school programs during the most recent academic year, specifically that the award was insufficient to cover the cost of graduate education. After consideration of the higher cost of graduate and professional school programs, the Committee agreed to increase the scholarship award to persons enrolled in master's, doctoral, and professional school degree programs to cover tuition and fees fully and provide an enhanced book allowance.

Public Information/Institutional Training Sessions

A schedule was established for statewide sessions to disseminate information to the public and participating education programs and higher education institutions, as well as to interact with current scholarship recipients, concerning the *Brown* Scholarship Program. It is envisioned that the sessions will help facilitate greater community outreach, better understanding of the program's objectives, and the appointment of liaisons to the Committee at institutions of higher education.

Closed Session

The Committee met in closed session pursuant to subdivision 37 of § 2.2-3711 of the *Code of Virginia* to set the annual tuition rate, review applications, and discuss and consider matters pertaining to the *Brown* Scholarship Program excluded from public discussion under this section.

Program Eligibility

After returning to open session, in the wake of recent controversial news articles, a lengthy discussion ensued regarding eligibility to

participate in the *Brown* Scholarship Program. The Committee asked staff to prepare for the next meeting a thorough review of Virginia's history during the Massive Resistance Era, giving particular attention to the consequences of the public policy statewide and events in localities that closed their schools to avoid desegregation. Staff was also directed to include a review of Chapter 34.1 (§ 30-231.01 et seq.) of Title 30 of the *Code of Virginia* in the presentation, and to seek an advisory opinion of the Attorney General regarding certain of the issues before the Committee.

Next Meeting

The Committee will meet jointly with the Dr. Martin Luther King, Jr. Memorial Commission on October 3, 2011, in Farmville, as a part of the Commission's and Committee's joint Special Subcommittee on the 50th Anniversary of Public School Closings in Virginia.



BROWN V. BOARD OF EDUCATION SCHOLARSHIP COMMITTEE

DELEGATE ROSLYN DANCE, CHAIR
BRENDA EDWARDS, DLS STAFF

910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804)786-3591

<http://dls.virginia.gov/brown.htm>

Joint Commission on Technology and Science

Several of the Advisory Committees created by the Joint Commission on Technology and Science (JCOTS) have been meeting during the summer to complete the work assigned to them.

Privacy Advisory Committee

The Privacy Advisory Committee, chaired by Delegate Joe T. May, has met twice this year. The first meeting was held on June 8, and a second meeting was held on August 15. The focus of both meetings was the discussion of HB 2032, referred to JCOTS for further study by the 2011 Session of the General Assembly. HB 2032 would make it a crime for anyone to use an electronic tracking device “through intentionally deceptive means” to track another person.

Discussions at both meetings hinged on the appropriate standard to be used in such legislation, and whether the standard should be placement of the device “through intentionally deceptive means” (as the bill was introduced), “without consent,” or a combination of the two. There was also debate as to whether the bill should be focused just on the placement of the electronic tracking devices on vehicles (again, how the bill was introduced), or on the use of tracking devices to track a person generally. The issue of what exceptions should be included in such a bill—such as exemptions for private investigators or employer-owned vehicles—will be discussed at the next meeting of the Advisory Committee, scheduled for November 21.

The August meeting also included an overview of the privacy law generally. Staff gave this presentation to provide some background on the privacy issues underlying HB 2032. A copy of the presentation is available on the JCOTS website.

UCITA Advisory Committee

The UCITA Advisory Committee, chaired by Senator John Watkins, met on August 1 to discuss HB 2259, referred to JCOTS for study by the 2011 Session of the General Assembly. The bill would amend the Uniform Computer Information Transactions Act (UCITA) to create liability provisions for federated identity management systems.

The Advisory Committee received a briefing from Carlyle Ring, Virginia’s chief Uniform Law Commissioner with the Uniform Law Commission, formerly known as the National Conference of Commissioners on Uniform State Law. UCITA was a recommendation of the Uniform Law Commission, and Mr. Ring chaired the Uniform Law Commission committee that developed UCITA. Mr. Ring explained the process involved in creating UCITA, and expressed his opinion that the uniform law should not be amended as suggested by HB 2259. If the General Assembly wishes to create legislation related to federated identity management, Mr. Ring suggested that it would be better suited elsewhere in the Code of Virginia.

The Advisory Committee discussed the concepts behind federated identity management, and the liability issues presented in the bill. For its next meeting on September 21, the Advisory Committee requested a briefing on other liability issues set forth in the *Code of Virginia* and a briefing from an entity engaged in identity management. The Advisory Committee also requested that the Secretary of Technology provide his opinion about the legislation at the September 21 meeting.

Transportation and Technology Advisory Committee

The Transportation and Technology Advisory Committee, chaired by Delegate Tom Rust, met on July 6. The Advisory Committee is focusing on two issues during the 2011 interim—distracted driving and remote emissions testing.

Staff provided the Advisory Committee with an overview of distracted driving legislation adopted by other states. “Distracted driving legislation” includes bills aimed at prohibiting texting while driving as well as bills that would require the use of hands-free devices for any use of a mobile communications device while driving. Virginia currently bans texting while driving, but makes the offense a secondary offense. It was noted that most states make texting while driving a primary offense. The Advisory Committee was interested in legislation adopted in Maine that was aimed at distracted driving generally, and not specifically at the act of texting or talking on a phone. Staff was requested to work on a similar draft to be reviewed at a future meeting.

The Advisory Committee also received an overview of remote sensing technologies from

The JCOTS Transportation and Technology Advisory Committee received an overview of distracted driving legislation adopted by other states.

The JCOTS Energy Advisory Committee received updates on renewable energy projects.

Environmental Systems Products, a company that provides this service. A copy of the presentation is available on the JCOTS website. It was noted that the Department of Environmental Quality (DEQ) had assembled, at the request of several members of the legislature, a stakeholders group to review the emissions testing program generally. This would include consideration of remote emissions testing. The stakeholders group plans to complete any recommendations or reports by early fall 2011. The Advisory Committee requested that DEQ keep it apprised of its recommendations, and the Advisory Committee will consider how to proceed on the issue after it has a chance to review the recommendations.

The next meeting of the Transportation and Technology Advisory Committee has not yet been scheduled.

Energy Advisory Committee

The Energy Advisory Committee, chaired by Delegate John Cosgrove, met on August 15. The Advisory Committee received several comprehensive and informative updates on renewable energy projects. These included presentations from New Planet Energy, Tidewater Biodiesel, and the Virginia Coastal Energy Research Consortium Director of Offshore Wind Research. A copy of each of these presentations is available on the JCOTS website. The Advisory Committee was also briefed by Opower concerning its energy efficiency programs, and a potential regulatory hurdle it faces with the State Corporation Commission.

The next meeting of the Energy Advisory Committee has not yet been scheduled.



JOINT COMMISSION ON TECHNOLOGY AND SCIENCE

DELEGATE JOE MAY, CHAIR
LISA WALLMEYER, EXECUTIVE DIRECTOR
WENZEL CUMMINGS, DLS STAFF
910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804) 786-3591
<http://jcots.dls.virginia.gov>

Virginia Housing Commission

The following work groups and sub-work groups of the Virginia Housing Commission have met since the beginning of May:

- Municipal Water/Landlord Issues Sub-Work Group.
- Common Interest Communities Work Group.
- Neighborhood Transitions and Residential Land Use Work Group.
- Housing and Environmental Standards Work Group.
- Receivership Sub-Work Group.
- Affordability, Real Estate Law and Mortgages Work Group.
- Mortgage Sub-Work Group.
- Timeshare Sub-Work Group.

For complete summaries of the work group and sub-work group meetings, please visit the Virginia Housing Commission website at <http://dls.virginia.gov/VHC.HTM>.



VIRGINIA HOUSING COMMISSION

DELEGATE JOHN COSGROVE, CHAIR
ELIZABETH PALEN, EXECUTIVE DIRECTOR
910 Capitol Street
General Assembly Bldg., 2nd Floor
Richmond, VA 23219
Telephone (804) 786-3591
<http://dls.virginia.gov/VHC.HTM>

Meeting Calendar for September–October 2011

Virginia Housing Commission Joint Meeting of the Affordability, Real Estate Law and Mortgages Work Group and Neighborhood Transitions and Residential Land Use Work Group Elizabeth Palen	Joint Meeting of the Affordability, Real Estate Law and Mortgages Work Group and Neighborhood Transitions and Residential Land Use Work Group 10:00 a.m., September 6, 2011—House Room C, GAB Full Commission Meeting 1:00 p.m., September 6, 2011—House Room C, GAB
Virginia Code Commission Jane Chaffin	12:00 p.m., September 7, 2011—6th Floor Speaker's Conference Room, GAB
Administrative Law Advisory Council Elizabeth Palen	2:30 p.m., September 14, 2011—5th Floor West Conference Room, GAB
Administrative Law Advisory Council Judicial Group Elizabeth Palen	12:00 p.m., September 21, 2011—5th Floor West Conference Room, GAB
JCOTS UCITA Advisory Committee Lisa Wallmeyer/Wenzel Cummings	1:00 p.m., September 21, 2011—4th Floor West Conference Room, GAB
Special Subcommittee: 50th Anniversary of Public School Closings in Virginia and Prince Edward County Town Hall Event Brenda Edwards	October 3, 2011—More information to be announced
Virginia Code Commission Jane Chaffin	10:00 a.m., October 3, 2011—6th Floor Speaker's Conference Room, GAB

Meetings may be added at any time, so please check the General Assembly and DLS websites for updates.

**Note: For this issue, there
were no regulations to include in
the Regulatory Alert section.**



Division of Legislative Services

*910 Capitol Street, 2nd Floor, Richmond, Virginia 23219
(804) 786-3591*

**Robert L. Tavenner, Director
R. J. Austin, Manager, Special Projects
Mindy Tanner, Editor and Publisher**

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910 Capitol Street, GAB, 2nd Floor
Richmond, Virginia 23219

