Gun Control

Also In This Issue

FOIA Exemption 10
Counterterrorism Law Book Review
Section Nominations in News & Events

ANNUAL MEETING ■ AUGUST 3–5, 2012 ■ CHICAGO, IL
The concept of homeland security has evolved from a mostly academic military proposal to the biggest reorganization of the federal government since the creation of a Defense Department in 1947. Homeland Security: Legal and Policy Issues draws upon the expertise of leading practitioners in the emerging and expanding field of homeland security. This comprehensive resource looks at homeland security as a critical area of legal practice affecting both the public and private sectors. It also serves as an important compilation of policy and practice-oriented information pertaining to the Homeland Security Act.

The book begins with an evaluation of the policy shifts and outcomes to date and looks ahead to the challenges that exist for the Obama Administration. It then seeks to familiarize you with 14 key and essential areas in the Homeland Security legal discipline such as state and federal emergency powers, the USA Patriot Act, information security, CFIUS and foreign investment and so much more. The expert authors have included easy references to additional authorities and information sites, making this publication a useful tool and lasting legal education sourcebook. Order your copy today.

“To be well informed on Homeland Security law this book is a must read.”

— The Honorable Tom Ridge, Chair of Ridge Global, Former Secretary of the U.S. Department of Homeland Security and Former Governor of Pennsylvania

$99.95 Regular price
$89.95 Administrative Law and Regulatory Practice section members

Product code: 5010060
2009 6 x 9 284 pages paperback

For more information, or to order, visit our website www.ababooks.org or call (800) 285-2221.
Chair’s Message

Michael Herz

Technology as a Driver of Change within Agencies
“Technology is a Driver of Change within Agencies”1

The technological determinists “identify technologies as historical causes. So, for example, the invention of the cotton gin is said to have “caused” the Civil War. Beforehand, slavery and the plantation system were starting to collapse along with the price of tobacco, and cotton was not and could not have become the major Southern crop. The gin saved the economic viability of slavery, which otherwise would have withered away. And the rest is history. No cotton gin, no Civil War.

Technological change indisputably affects history. But reductionist technological determinism seems to me to overlook several things. One is the lawyer’s distinction between but-for, and proximate cause. History is full of but-for causes—it might be said to consist of nothing else. Thus, every day there’s a new book about some hidden but vital contributor to the world as we know it. At least according to the subtitles of the books written about them, the things that have “changed the world” include pepper (unless it’s salt), cod, sugar, coffee (no, wait: not coffee, tea), gunpowder, the Irish (or just their best-known beer10), a handful of mathematical equations,11 the 1960 Summer Olympics,12 and, let’s not forget, the banana.13 It turns out that “changing the world” is a pretty low bar. The flapping wings of the chaos theorist’s butterfly changed the world. Of course the world would look different had there been no cod or salt or Irish. However, but-for causes are less interesting precisely because they are countless.

Second, technological determinist accounts are a version of “winner’s history.” The many, many technologies that didn’t change the world are invisible, as are the many ways in which successful technologies have left the world unaltered.

Third, human beings decide how to use technologies; these choices, options pursued and options forgone, determine a given technology’s impact. The Internet is a but-for cause of many contemporary changes, inside and outside law. It is less clear that it is a proximate cause of any; like other tools, the Internet is what people make of it. Of course, the nature of a technology limits the choices. This has always been true: “If all you have is a hammer, everything looks like a nail.” And sometimes human beings choose to use a particular technology thoughtlessly, simply because they can. But the effect of a new technology is neither built in nor automatic; human agency looms large.

This truth was brought home to me at the Section’s Spring Meeting, which began with a day-long conference at Princeton University, co-sponsored by two Princeton entities, the Program in Law and Public Affairs and the Center for Information Technology Policy. The day’s topic was “The Administrative Agency in an Electronic Age,” and attendees were treated to a series of truly first-rate presentations on agency websites, open government, e-rulemaking, and new monitoring techniques. Over the course of the day, I was struck at how in some settings the new technologies have changed things less than one might have expected and in others more.

Consider e-rulemaking, which was the subject of a panel composed of Cynthia Farina, Neil Eisner, Tino Cuellar, and Carol Ann Siciliano. With different emphases, each speaker made clear that the much-anticipated e-rulemaking “revolution” has not happened—at least not yet. We have moved from the traditional paper-based notice-and-comment process to an electronic version thereof, “Rulemaking 2.0”—a more fully participatory, dialogic process that would employ electronic tools such as Twitter, Facebook, continued on next page

---

1 Attribution to, well, just about everyone at one time or another.
4 See in particular Peter Mancinis, Bittersweet: The Story of Sugar (Allen & Unwin 2003); Sidney W. Mintz, Sweetness and Power: The Place of Sugar in Modern History (Penguin 1986).
9 Thomas Cahill, How the Irish Saved Civilization: The Untold Story of Ireland’s Heroic Role from the Fall of Rome to the Rise of Medieval Europe (Anchor 1996).
13 Dan Koeppel, Banana: The Fate of the Fruit That Changed the World (Plum 2008).
blogs, discussion forums, collaborative content creation, and others that do not yet exist—may never happen, and it certainly will not happen by itself. As Cynthia put it, in the case of e-rulemaking it is emphatically not the case that “if you build it, they will come.” At least in the rulemaking arena, new technology has not led to or required a reconceptualization of the process. In isolated instances, it has led to a huge number of comments, but such rulemakings remain the exception, and even when it has occurred, the deluge has not proved especially useful. Crowds do not always bring wisdom, and the move online has not brought with it a newly engaged, thoughtful, and participatory citizenry.

One message of the panel—explicit in Cynthia’s presentation and implicit in the others—is that a fully collaborative and participatory process is actually not appropriate for all rulemakings. For particular rules and particular issues, the extensive lay participation made possible by electronic tools will be valuable, but for many others it will be cumbersome, effortful, and unsatisfying. So the key is to identify the settings where it will be valuable and figure out how to ensure it happens. In this respect, Rulemaking 2.0 may be something like negotiated rulemaking, an initiative the Section has long endorsed, notwithstanding some reservations within our ranks. “Reg neg” is not a technological change, of course, but it too involves a new way of doing an old task, and it shares some of the same goals as e-rulemaking. The theory is that adopting a more open and collaborative process (in the reg neg setting, the greater participation is by proxy) will produce better rules, more buy-in, more democracy, less litigation, and better compliance. Like e-rulemaking, reg neg has not lived up to its supporters’ highest hopes. Happily, I don’t need to get into the question of why that is; for present purposes it is enough to note that everyone, including the Administrative Conference of the United States, the United States Congress, and reg neg’s enthusiasts, all agree that it is not appropriate for every rulemaking. The circumstances have to be right. The same seems to be true for Rulemaking 2.0. The technology is not going to tell us when it should be used and when not; that remains a task for human beings.

If technology is not producing the heralded revolution in rulemaking, it is having a greater substantive impact with regard to freedom of information. Since the Freedom of Information Act was passed in 1966, the FOIA regime has rested on a request-driven model. The government has “records” in its possession; anyone can obtain copies of those records by asking for them. But why, one might wonder, must the government wait to be asked?

Well, one answer is in the form of another question: how would the government disseminate records without being asked? The pre-Internet tools—newspapers, the Federal Register, agency reading rooms, federal depository libraries—were expensive and pretty unsatisfying if the idea really is broad dissemination and meaningful availability. The electronic revolution generally, and the Internet in particular, have provided the perfect tools for affirmative disclosure of government records. And with the development of those tools has come a substantive shift in the law and policy of disclosure.

There have been two significant lurches toward greater affirmative disclosure since FOIA’s enactment. The first was adoption of the Electronic Freedom of Information Act of 1996, which made two essential amendments. First, EFOIA required that records that already had to be “made available” in agency reading rooms also be made available in electronic format. (Dating itself, the statutory language indicates that “electronic format” can mean floppy disks or CDROMs. However, those media are acceptable only if an agency has not established “computer telecommunications.”) At this point, all federal agencies have done so, so as a practical matter, the Act now requires posting to the Internet. This change did not expand the scope of affirmative disclosure requirements; it just made the covered records more meaningfully available. Thus, it was a change akin to the move to eRulemaking 1.0, not a change in the nature of the process but a gain in convenience and accessibility.

But the 1996 law also made a substantive change, meaningfully expanding the sorts of records that must be affirmatively disclosed. Under what is generally referred to as the “frequently requested records” provision, an agency has to put into the reading room (and thus on line) any record that (i) has been provided to a requester and (ii) is likely to be, or has been, requested at least two more times (subsequent “requests,” plural). Thus, anything that would otherwise be “(a)(3) material,” available by request, becomes “(a)(2) material,” affirmatively disclosed, once it has been flagged as being interesting to three requesters.

I don’t think it was a coincidence that this significant expansion of the affirmative disclosure obligation occurred simultaneously with the then new-found ability to provide records in electronic form. The second large shift toward affirmative disclosure is taking place right now. Congress has had less to do with this. While the E-Government Act, the Federal Funding Accountability and Transparency Act, and other specific enactments have played a role, more important has been agency initiative and White House directive. While the Obama Administration’s Open Government Initiative perhaps promised more than it has delivered, that is primarily an indication of how bold the promises have been. The fact is that agencies are now making publicly available an unprecedented amount of data (the term “records” is in many respects an anachronism).

Chair’s Message  

continued on page 31  

14 5 U.S.C. § 552(a)(2)(D) (“Each agency...shall make available for public inspection and copying...copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records...”).

15 In addition to individual agency websites generally, see each agency's electronic reading room and open government page (http://www. [agency].gov/open), as well as data.gov, recovery.gov, USA Spending.gov, and reginfo.gov. Particularly notable individual agency disclosure sites include the SEC's EDGAR database, http://www.sec.gov/edgar.shtml; the Toxic Release Inventory, http://www.epa.gov/tri; EPA's "ECHO" page, with details on inspections and enforcement at 800,000 regulated facilities, http://www.epa.gov/compliance/data/systems/multimedia/echo.html; and OSHA's equivalent site, http://oshsdw.dol.gov. And this is just the tip of the iceberg.
Chair’s Message ................................................................. 1
The American Revolution Against British Gun Control ............................ 4
Dangerous People or Dangerous Weapons: Keeping Arms Away from the Dangerous in the Wake of an Expansive Reading of the Second Amendment ........................................ 8
Keeping Firearms Out of the Hands of the Dangerous Mentally Ill .......... 11
The Second Amendment Standard of Review: The Quintessential Clean-Slate for Sliding-Scale Scrutiny ............................ 13
Amending the FOIA: Is it Time for a Real Exemption 107? ...................... 16
2012 Annual Meeting ................................................................ 21
Supreme Court News .......................................................... 22
News from the Circuits ................................................................ 26
News from the States ............................................................. 29
Section News and Events ......................................................... 30

Administrative & Regulatory Law News

Editor-in-Chief: William S. Morrow, Jr., Executive Director/General Counsel, Washington Metropolitan Area Transit Commission
Advisory Board Chair: Michael Asimow, Visiting Professor of Law, Stanford Law School; Professor of Law Emeritus, UCLA Law School
Advisory Board Members: Warren Belmar, Managing Director, Capitol Counsel Group, LLC; Daniel Cohen, Assistant General Counsel for Legislation, Regulation, and Energy Efficiency, U.S. Department of Energy; John Cooney, Partner, Venable, LLP; Cynthia A. Drew, Associate Professor of Law, University of Miami School of Law; William Funk, Professor of Law, Lewis & Clark Law School; Philip J. Harter, Earl F. Nelson Professor of Law, University of Missouri–Columbia School of Law; James T. O’Reilly, Professor of Law, University of Cincinnati College of Law
Contributing Editors: Robin Kundis Craig, Professor of Law, S.J. Quinney College of Law; William S. Jordan III, C. Blake McDowell Professor of Law, The University of Akron School of Law; Daniel J. Metcalfe, Adjunct Professor of Law, Washington College of Law, and Executive Director of its Collaboration on Government Secrecy; Edward J. Schoenbaum, Administrative Law Judge, Illinois Dep’t of Employment Secrecy

The Administrative & Regulatory Law News (ISSN 1544–1547) is published quarterly by the Section of Administrative Law & Regulatory Practice of the American Bar Association to provide information on developments pertaining to administrative and regulatory law and policy, Section news, and other information of professional interest to Section members and other readers.

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

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

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

©American Bar Association 2012. Articles appearing in this publication may not be reprinted without the express permission of the ABA.
The American Revolution
Against British Gun Control

By David B. Kopel*

This Article reviews the British gun control program that precipitated the American Revolution: the 1774 import ban on firearms and gunpowder; the 1774–75 confiscations of firearms and gunpowder; and the use of violence to effectuate the confiscations. It was these events that changed a situation of political tension into a shooting war. Each of these British abuses provides insights into the scope of the modern Second Amendment.

Furious at the December 1773 Boston Tea Party, Parliament in 1774 passed the Coercive Acts. The particular provisions of the Coercive Acts were offensive to Americans, but it was the possibility that the British might deploy the army to enforce them that primed many colonists for armed resistance. The Patriots of Lancaster County, Pennsylvania, resolved: “That in the event of Great Britain attempting to force unjust laws upon us by the strength of arms, our cause we leave to heaven and our rifles.” A South Carolina newspaper essay, reprinted in Virginia, urged that any law that had to be enforced by the military was necessarily illegitimate.

The Royal Governor of Massachusetts, General Thomas Gage, had forbidden town meetings from taking place more than once a year. When he dispatched the Redcoats to break up an illegal town meeting in Salem, 3,000 armed Americans appeared in response, and the British retreated. Gage’s aide John Andrews explained that everyone in the area aged 16 years or older owned a gun and plenty of gunpowder.

Military rule would be difficult to impose on an armed populace. Gage had only 2,000 troops in Boston. There were thousands of armed men in Boston alone, and more in the surrounding area. One response to the problem was to deprive the Americans of gunpowder.

Modern “smokeless” gunpowder is stable under most conditions. The “black powder” of the 18th Century was far more volatile. Accordingly, large quantities of black powder were often stored in a town’s “powder house,” typically a reinforced brick building. The powder house would hold merchants’ reserves, large quantities stored by individuals, as well as powder for use by the local militia. Although colonial laws generally required militiamen (and sometimes all householders, too) to have their own firearm and a minimum quantity of powder, not everyone could afford it. Consequently, the government sometimes supplied “public arms” and powder to individual militiamen. Policies varied on whether militiamen who had been given public arms would keep them at home. Public arms would often be stored in a special armory, which might also be the powder house.

Before dawn on September 1, 1774, 260 of Gage’s Redcoats sailed up the Mystic River and seized hundreds of barrels of powder from the Charlestown powder house.

The “Powder Alarm,” as it became known, was a serious provocation. By the end of the day, 20,000 militiamen had mobilized and started marching towards Boston. In Connecticut and Western Massachusetts, rumors quickly spread that the Powder Alarm had actually involved fighting in the streets of Boston. More accurate reports reached the militia companies before that militia reached Boston, and so the war did not begin in September. The message, though, was unmistakable: If the British used violence to seize arms or powder, the Americans would treat that violent seizure as an act of war, and would fight. And that is exactly what happened several months later, on April 19, 1775.

Five days after the Powder Alarm, on September 6, the militia of the towns of Worcester County assembled on the Worcester Common. Backed by the formidable array, the Worcester Convention took over the reins of government, and ordered the resignations of all militia officers, who had received their commissions from the Royal Governor. The officers promptly resigned and then received new commissions from the Worcester Convention.

That same day, the people of Suffolk County (which includes Boston) assembled and adopted the Suffolk Resolves. The 19-point Resolves complained about the Powder Alarm, and then took control of the local militia away from the Royal Governor (by replacing the Governor’s appointed officers with officers elected by the militia) and resolved to engage in group practice with arms at least weekly.

The First Continental Congress, which had just assembled in Philadelphia, unanimously endorsed the Suffolk Resolves and urged all the other colonies to send supplies to help the Bostonians.

Governor Gage directed the Redcoats to begin general, warrantless searches for arms and ammunition. According to the Boston Gazette, of all General Gage’s offenses, “what most irritated the People” was “seizing their Arms and Ammunition.”

When the Massachusetts Assembly convened, General Gage declared it illegal, so the representatives reassembled as the “Provincial Congress.” On October 26, 1774, the Massachusetts Provincial Congress adopted a resolution condemning military rule, and criticizing Gage for “unlawfully seizing

* Research Director, Independence Institute, and Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law. This article is adapted from How the British Gun Control Program Precipitated the American Revolution, 6 CHARLESTON L. REV. 283 (2012), available at http://ssrn.com/abstract=1967702.
and retaining large quantities of ammunition in the arsenal at Boston.” The Provincial Congress urged all militia companies to organize and elect their own officers. At least a quarter of the militia (the famous Minute Men) were directed to “equip and hold themselves in readiness to march at the shortest notice.” The Provincial Congress further declared that everyone who did not already have a gun should get one, and start practicing with it diligently.

In flagrant defiance of royal authority, the Provincial Congress appointed a Committee of Safety and vested it with the power to call forth the militia. The militia of Massachusetts was now the instrument of what was becoming an independent government of Massachusetts.

Lord Dartmouth, the Royal Secretary of State for America, sent Gage a letter on October 17, 1774, urging him to disarm New England. Gage replied that he would like to do so, but it was impossible without the use of force. After Gage’s letter was made public by a reading in the British House of Commons, it was publicized in America as proof of Britain’s malign intentions.

Two days after Lord Dartmouth dispatched his disarmament recommendation, King George III and his ministers blocked importation of arms and ammunition to America. Read literally, the order merely required a permit to export arms or ammunition from Great Britain to America. In practice, no permits were granted.

Meanwhile, Benjamin Franklin was masterminding the surreptitious import of arms and ammunition from the Netherlands, France, and Spain.

The patriotic Boston Committee of Correspondence learned of the arms embargo and promptly dispatched Paul Revere to New Hampshire, with the warning that two British ships were headed to Fort William and Mary, near Portsmouth, New Hampshire, to seize firearms, cannons, and gunpowder.

On December 14, 1774, 400 New Hampshire patriots preemptively captured all the material at the fort. A New Hampshire newspaper argued that the capture was prudent and proper, reminding readers that the ancient Carthaginians had consented to “deliver up all their Arms to the Romans” and were decimated by the Romans soon after.

In Parliament, a moderate minority favored conciliation with America. Among the moderates was the Duke of Manchester, who warned that America now had three million people, and most of them were trained to use arms. He was certain they could produce a stronger army than Great Britain.

The Massachusetts Provincial Congress offered to purchase as many arms and bayonets as could be delivered to the next session of the Congress. Massachusetts also urged American gunsmiths “diligently to apply themselves” to making guns for everyone who did not already have a gun. A few weeks earlier, the Congress had resolved: “That it be strongly recommended, to all the inhabitants of this colony, to be diligently attentive to learning the use of arms . . . .”

Derived from political and legal philosophers such as John Locke, Hugo Grotius, and Edward Coke, the ideology underlying all forms of American resistance was explicitly premised on the right of self-defense of all inalienable rights; from the self-defense foundation was constructed a political theory in which the people were the masters and government the servant, so that the people have the right to remove a disobedient servant.

The British government was not, in a purely formal sense, attempting to abolish the Americans’ common law right of self-defense. Yet in practice, that was precisely what the British were attempting. First, by disarming the Americans, the British were attempting to make the practical exercise of the right of personal self-defense much more difficult. Second, and more fundamentally, the Americans made no distinction between self-defense against a lone criminal or against a criminal government. To the Americans, and to their British Whig ancestors, the right of self-defense necessarily implied the right of armed self-defense against tyranny.

The troubles in New England inflamed the other colonies. Patrick Henry’s great speech to the Virginia legislature on March 23, 1775, argued that the British plainly meant to subjugate America by force. Because every attempt by the Americans at peaceful reconciliation had been rebuffed, the only remaining alternatives for the Americans were to accept slavery or to take up arms. If the Americans did not act soon, the British would soon disarm them, and all hope would be lost. “The millions of people, armed in the holy cause of liberty, and in such a country as that which we possess, are invincible by any force which our enemy can send against us,” he promised.

The Convention formed a committee—including Patrick Henry, Richard Henry Lee, George Washington, and Thomas Jefferson—“to prepare a plan for the embodying, arming, and disciplining such a number of men as may be sufficient” to defend the commonwealth. The Convention urged “that every Man be provided with a good Rifle” and “that every Horseman be provided . . . with Pistols and Holsters, a Carbine, or other Firelock.” When the Virginia militiamen assembled a few weeks later, many wore canvas hunting shirts adorned with the motto “Liberty or Death.”

In South Carolina, patriots established a government, headed by the “General Committee.” The Committee described the British arms embargo as a plot to disarm the Americans in order to enslave them. Thus, the Committee recommended that “all persons” should “immediately” provide themselves with a large quantity of ammunition.

Without formal legal authorization, Americans began to form independent militia, outside the traditional chain of command of the royal governors. In Virginia, George Washington and George Mason organized the Fairfax Independent Militia Company. The Fairfax militiamen pledged that “we will, each of us, constantly keep by us” a firelock, six pounds of gunpowder, and twenty pounds of lead. Other independent militia embodied in Virginia along the same model. Independent militia
also formed in Connecticut, Rhode Island, New Hampshire, Maryland, and South Carolina, choosing their own officers.

John Adams praised the newly constituted Massachusetts militia, "commanded through the province, not by men who procured their commissions from a governor as a reward for making themselves pimps to his tools."

The American War of Independence began on April 19, 1775, when 700 Redcoats left Boston to seize American arms at Lexington and Concord.

The militia that assembled at the Lexington Green and the Concord Bridge consisted of able-bodied men aged 16 to 60. They supplied their own firearms, although a few poor men had to borrow a gun. Warned by Paul Revere and Samuel Dawes of the British advance, the young women of Lexington assembled cartridges late into the evening of April 18.

At dawn, the British confronted about 200 militiamen at Lexington. "Disperse you Rebels—Damn you, throw down your Arms and disperse!" ordered Major John Pitcairn. The Americans were quickly routed.

With a "huzzah" of victory, the Redcoats marched on to Concord, where one of Gage's spies had told him that the largest Patriot reserve of gunpowder was stored. At Concord's North Bridge, the town militia met with some of the British force, and after a battle of two or three minutes, drove off the British.

Notwithstanding the setback at the bridge, the Redcoats had sufficient force to search the town for arms and ammunition. But the main powder stores at Concord had been hauled to safety before the Redcoats arrived.

When the British began to withdraw back to Boston, things got much worse for them. Armed Americans were swarming in from nearby towns. They would soon outnumber the British 2:1. Although some of the Americans cohered in militia units, a great many fought on their own, taking sniper positions wherever opportunity presented itself. Only British reinforcements dispatched from Boston saved the British expedition from annihilation—and the fact that the Americans started running out of ammunition and gun powder.

One British officer reported: "These fellows were generally good marksmen, and many of them used long guns made for Duck-Shooting." On a per-shot basis, the Americans inflicted higher casualties than had the British regulars.

That night, the American militiamen began laying siege to Boston, where General Gage's standing army was located. At dawn, Boston had been the base from which the King's army could project force into New England. Now, it was trapped in the city, surrounded by people in arms.

Two days later, the government in London dispatched more troops and three more generals to America: William Howe, Henry Clinton, and John Burgoyne. The generals arrived on May 25, 1775, with orders from Lord Dartmouth to seize all arms in public armories, or which had been "secretly collected together for the purpose of aiding Rebellions."

The war underway, the Americans captured Fort Ticonderoga in upstate New York. At the June 17 Battle of Bunker Hill, the militia held its ground against the British regulars and inflicted heavy casualties, until they ran out of gunpowder and were finally driven back. (Had Gage not confiscated the gunpowder from the Charlestown Powder House the previous September, the Battle of Bunker Hill probably would have resulted in an outright defeat of the British.)

On June 19, Gage renewed his demand that the Bostonians surrender their arms, and he declared that anyone found in possession of arms would be deemed guilty of treason.

Meanwhile, the Continental Congress had voted to send ten companies of riflemen from Pennsylvania, Maryland, and Virginia to aid the Massachusetts militia.

On July 6, 1775, the Continental Congress adopted the Declaration of Causes and Necessity of Taking Up Arms, written by Thomas Jefferson and the great Pennsylvania lawyer John Dickinson. Among the grievances were General Gage's efforts to disarm the people of Lexington, Concord, and Boston.

Two days later, the Continental Congress sent an open letter to the people of Great Britain warning that "men trained to arms from their Infancy, and animated by the Love of Liberty, will afford neither a cheap or easy conquest."

The Swiss immigrant John Zubly, who was serving as a Georgia delegate to the Continental Congress, wrote a pamphlet entitled Great Britain's Right to Tax... By a Swiss, which was published in London and Philadelphia. He warned that "in a strong sense of liberty, and the use of fire-arms almost from the
cradle, the Americans have vastly the advantage over men of their rank almost every where else.” Indeed, children were “shouldering the resemblance of a gun before they are well able to walk.” “The Americans will fight like men, who have everything at stake,” and their motto was “DEATH OR FREEDOM.” The town of Gorham, Massachusetts (now part of the State of Maine), sent the British government a warning that even “many of our Women have been used to handle the Cartridge and load the Musquet.”

It was feared that the Massachusetts gun confiscation was the prototype for the rest of America. For example, a newspaper article published in three colonies reported that when the new British generals arrived, they would order everyone in America “to deliver up their arms by a certain stipulated day.”

The events of April 19 convinced many more Americans to arm themselves and to embody independent militia. A report from New York City observed that “the inhabitants there are arming themselves . . . forming companies, and taking every method to defend our rights. The like spirit prevails in the province of New Jersey, where a large and well disciplined militia are now fit for action.”

In Virginia, Lord Dunmore observed: “Every County is now Arming a Company of men whom they call an independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require.” North Carolina’s Royal Governor Josiah Martin issued a proclamation outlawing independent militia, but it had little effect.

A Virginia gentleman wrote a letter to a Scottish friend explaining in America:

We are all in arms, exercising and training old and young to the use of the gun. No person goes abroad without his sword, or gun, or pistols . . . Every plain is full of armed men, who all wear a hunting shirt, on the left breast of which are sewed, in very legible letters, “Liberty or Death.”

The British escalated the war. Royal Admiral Samuel Graves ordered that all seaports north of Boston be burned. When the British navy showed up at what was then known as Falmouth, Massachusetts (today’s Portland, Maine), the town attempted to negotiate. The townspeople gave up eight muskets, which was hardly sufficient, and so Falmouth was destroyed by naval bombardment.

The next year, the 13 Colonies would adopt the Declaration of Independence. The Declaration listed the tyrannical acts of King George III, including his methods for carrying out gun control: “He has plundered our seas, ravaged our Coasts, burnt our Towns, and destroyed the Lives of our people.”

As the war went on, the British always remembered that without gun control, they could never control America. In 1777, with British victory seeming likely, Colonial Undersecretary William Knox drafted a plan entitled “What Is Fit to Be Done with America?” To ensure that there would be no future rebellions, “[t]he Militia Laws should be repealed and none suffered to be re-enacted, & the Arms of all the People should be taken away, . . . nor should any Foundery or manufactury of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence . . .”

To the Americans of the Revolution and the Founding Era, the theory of some late-20th Century courts that the Second Amendment is a “collective right” and not an “individual right” might have seemed incomprehensible. The Americans owned guns individually, in their homes. They owned guns collectively, in their town armories and powder houses. They would not allow the British to confiscate their individual arms, nor their collective arms; and when the British tried to do both, the Revolution began. The Americans used their individual arms and their collective arms to fight against the confiscation of any arms. Americans fought to provide themselves a government that would never perpetrate the abuses that had provoked the Revolution.

What are modern versions of such abuses? The reaction against the 1774 import ban for firearms and gunpowder (via a discretionary licensing law) indicates that import restrictions are unconstitutional if their purpose is to make it more difficult for Americans to possess guns. The federal Gun Control Act of 1968 prohibits the import of any firearm that is not deemed “sporting” by federal regulators. That import ban seems difficult to justify based on the historical record of 1774-76.

Laws disarming people who have proven themselves to be a particular threat to public safety are not implicated by the 1774-76 experience. In contrast, laws that aim to disarm the public at large are precisely what turned a political argument into the American Revolution.

The most important lesson for today from the Revolution is about militaristic or violent search and seizure in the name of disarmament. As Hurricane Katrina bore down on Louisiana, police officers in St. Charles Parish confiscated firearms from people who were attempting to flee. After the hurricane passed, officers went house to house in New Orleans, breaking into homes and confiscating firearms at gunpoint. The firearms seizures were flagrantly illegal under existing state law. A federal district judge soon issued an order against the confiscation, ordering the return of the seized guns.

When there is genuine evidence of potential danger—such as evidence that guns are in the possession of a violent gang—then the Fourth Amendment properly allows no-knock raids, flashbang grenades, and similar violent tactics to carry out a search. Conversely, if there is no real evidence of danger—for example, if it is believed that a person who has no record of violence owns guns but has not registered them properly—then militaristically violent enforcement of a search warrant should never be allowed. Gun ownership simpliciter ought never to be a pretext for government violence. The Americans in 1775 fought a war because the king did not agree.
Dangerous People or Dangerous Weapons: Keeping Arms Away from the Dangerous in the Wake of an Expansive Reading of the Second Amendment

By Katherine L. Record and Lawrence O. Gostin*

“None of us can know with any certainty what might have stopped these shots from being fired, or what thoughts lurked in the inner recesses of a violent man’s mind”
—President Barack Obama, January 12, 2011

Introduction

Wide publicity shootings directed at high-profile individuals (e.g., Rep. Gabrielle Giffords, President Ronald Reagan, and John Lennon) or crowds of civilians (e.g., Virginia Tech University, Columbine High School) fuel public perception that all persons with mental illness are dangerous. These tragic events repeatedly renew the politically divisive debate about the appropriate response to violence: ban dangerous weapons or prohibit dangerous individuals from possessing firearms?

The public overwhelmingly supports limiting certain persons’ access to firearms, including children, violent criminals, and persons with mental illness. Legislators have responded with a patchwork of laws that exclude broad classes of individuals from purchasing firearms. While children lack the competency and maturity to use firearms wisely, and most convicted felons have a history of violence, singling out persons with mental illness is far more complex because they represent a broad spectrum of individuals, the majority of whom are not violent. Moreover, predictions of dangerousness are highly inaccurate and categorical restrictions are rife with loopholes.

The Second Amendment: An Expanded Interpretation

An individual right to bear arms is not an absolute constitutional guarantee, but the Supreme Court’s recent decision that the Second Amendment confers an expansive individual right to bear arms renders it increasingly difficult to enact generally applicable laws regarding firearms, In 2008, the Court held for the first time that the Second Amendment protects an individual’s right to possess a loaded handgun—striking down the District of Columbia’s ban on handguns and its requirement that other arms be unloaded or locked.1 Shortly thereafter, the Court went further, finding that the Second Amendment limits not only the federal regulation of firearms but state restrictions as well, rejecting the long-held premise that the Second Amendment serves not to arm the civilian public but to protect the states from unfettered federal power.2

Legally speaking, the Court held that the right to bear arms was so fundamental that due process required that it constrain state as well as federal power. Practically speaking, the Court held that the right to bear arms was so fundamen-

dtal that all regulations would be held to the same standard—from Camden, New Jersey, to Recluse, Wyoming—regardless of legislators’ interest in curbing violent crime. Bans that one might expect in densely populated urban areas—such as restrictions against concealed weapons or dangerous handguns—are prohibited. Other categorical restrictions such as limiting the number of arms an individual may possess, requiring gun owners to enroll in firearm training, or imposing licensing requirements on purchasers are all subject to litigation. In the wake of the Court’s recent rulings, the National Rifle Association (NRA) has challenged numerous firearm regulations, including a ban on sales to children and teens, threatening fiscally constrained municipalities and states with expensive legal battles.

In other words, limitations on the right to bear arms can be placed only on certain groups (e.g., felons, the mentally ill) or in certain locations (e.g., government or school buildings). In hindsight, Jared Lee Loughner—the youth accused of shooting Rep. Giffords—is easily labeled as mentally ill, but prospectively identifying such dangerous individuals is difficult.

Gun Control Laws: Inefficient and Ineffective

Gun advocates applauded the Court’s recent interpretations of the Second Amendment, asserting that categorical restrictions (e.g., based on mental illness or a criminal record) are the only Constitutional limits that can be placed on the right to bear arms. Yet they fail to propose a workable solution for keeping arms out of the hands of the dangerous, demonstrating a blind reliance

---

* Katherine Record is a Senior Fellow at the Center for Health Law & Policy Innovation, Harvard Law School. Lawrence Gostin is the Linda D. & Timothy J. O’Neill Professor of Global Health Law and Faculty Director, O’Neill Institute for National & Global Health Law, at the Georgetown University Law Center. This article is adapted from their articles, A Robust Individual Right to Bear Arms Versus the Public’s Health: The Court’s Reliance on Firearm Restrictions on the Mentally Ill, 6 CHARLESTON L. REV. 371 (2012), and Dangerous People or Dangerous Weapons: Access to Firearms for Persons with Mental Illness, 306 JAMA 930 (2011).

on a system of categorical restrictions that have failed to protect the public. To understand why this is, one need only review the patchwork of federal and state gun control laws, a system ubiquitous for its inadequacy.

The Gun Control Act of 1968 restricts “prohibited persons” from purchasing firearms, including individuals addicted to controlled substances, those involuntarily committed to a mental institution or adjudicated as incompetent or dangerous, and those who receive a verdict of not guilty by reason of insanity. In theory, the National Instant Criminal Background Check System (NICS) contains the definitive list of individuals to whom licensed dealers may not sell firearms. In practice, however, information on many prohibited persons is never entered into NICS’s database.

Reasoning that NICS breaches federalism, the Supreme Court ruled in 1997 that Congress could not compel states to report to the FBI the names of prohibited persons who attempt to purchase firearms. Consequently, reporting is inaccurate and incomplete; some states over-report (including patients who voluntarily seek outpatient treatment) and others under-report (including only individuals who are involuntarily committed for ninety-plus days or those who are committed to public hospitals). Moreover, as of 2007, 28 states did not report inpatients with mental illness at all. The Government Accountability Office estimates that NICS mental illness data fall short by more than two million individuals.

Even if listed in NICS, prohibited persons can successfully avoid background checks. Unlicensed (second-hand) dealers (like the individual who sold guns to the Columbine shooters) are not required to conduct background checks and can sell at gun shows—a notorious loophole in NICS. Additionally, states can issue Brady permits that allow licensed sellers to waive background checks; nineteen states offer these permits, seven of which do not exclude persons with mental illness from purchasing firearms.

Although Congress cannot compel state cooperation in arms control efforts, the Gun Control Act incentivizes state regulation by making it a federal offense to sell firearms to individuals whose possession would violate state law. Yet not all states impose regulations based on mental illness, and of those that do, some restrict only access to concealed weapons, or rely, in part, on buyer self-identification as mentally ill. Thus, even where state law supplements federal regulations, mentally ill purchasers have access to firearms.

Categorically restricting access to firearms for the mentally ill has proved difficult and ineffectual, reducing neither suicide nor homicide rates. Universally applicable restrictions appear more effective; states with the most stringent firearms laws have the lowest per capita homicide rates. Yet, the Supreme Court’s rulings push states to regulate dangerous persons rather than dangerous firearms. Thus, policy makers must find narrow and accurate ways to identify individuals who are unlikely to use firearms safely.

Regulating People, Not Firearms

Successfully reducing firearms-related violence requires effectively and consistently identifying dangerous individuals and keeping firearms out of their hands. Both are impossible. Categorical restrictions, which are designed to protect the public with minimal infringement on Second Amendment rights, paradoxically threaten both public safety and individual rights. Arms proponents concede that predictions of dangerousness are an insufficient means of protecting the public, with some going so far as to suggest that a safe public is a universally armed public.

Prospectively identifying dangerous individuals is fraught with error. Research is limited but suggests that the increased risk in violence associated with mentally ill persons is extremely modest, if existent at all. If there is an inflated risk of violence, it more typically is associated with minor, not deadly, acts. Even those recently discharged from mental institutions are no more prone to violence than their peers, unless they suffer from comorbid substance abuse or a history of violence. In fact, it is those who have not yet been diagnosed who may pose the most risk, as certain untreated mental illnesses leave a person with reduced self-control. Nonetheless, existing restrictions on the sale of firearms tend to be based on the defined thresholds of involuntary commitment, adjudicated dangerousness, and receipt of verdict of not guilty by reason of insanity. Because these proxies often follow rather than preclude acts of violence, they have limited utility.

Removing firearms post-purchase is even more problematic. A minority of states require a license to purchase or possess a handgun, some of which remain valid for years or indefinitely. Even where states have the capacity to match adjudications with purchasing records, law enforcement lacks the resources to track down and remove weapons from prohibited persons. An estimated 200,000 individuals have lost competence to safely operate a legally purchased gun.

Categorical restrictions do not reliably keep firearms from violent persons. Nearly three million mentally ill individuals meet the criteria for firearms restrictions, but only a few hundred thousand are listed in NICS. Regulating people and not arms will always prove deficient in the wake of the next tragedy. Nevertheless, even imperfect legislation must protect patient privacy.

Gun Owners Forgo Expectations of Medical Privacy

Mental health records contain sensitive information. Fear of disclosure may dissuade individuals from being honest with physicians or even seeking treatment. Nonetheless, the Supreme Court has upheld restrictions on access to firearms based on involuntary commitment or adjudication as a “mentally defective,” meaning that gun control laws circumvent medical privacy laws, subjecting mentally ill patients to unauthorized disclosure of treatment and diagnosis details.

Individuals waive the right to privacy when purchasing firearms from a licensed dealer. Firearms transaction records require full disclosure (subject to federal prosecution) of personal information, including current addiction to controlled substances, past involuntary commitments, and adjudication as “mentally defective,” which the Department of
Justice (DOJ) can access and share freely. In other words, the buyer retains no expectation of privacy in disclosed information; the form is inspected not only by the seller, but also by state and federal agents in connection with criminal investigations and annual inspections of the dealer. Although NICS limits otherwise unauthorized access, the DOJ is free to share this information “without regard for privacy or confidentiality.” Moreover, should a purchaser challenge a denial of a state permit or license, courts will allow sharing of mental health records to determine whether the application for licensure was properly denied.

Privacy intrusions occur at the state level as well. The Gun Control Act does not require states to safeguard privacy such as by prohibiting over-reporting, disclosure to nonessential personnel, or release of diagnosis. State law often requires mental health professionals to alert authorities if a patient is dangerous to himself or herself or to others. For example, Illinois inpatient facilities must report involuntary hospitalizations to the police for inclusion in NICS. Five states require arms purchasers to waive confidentiality of all mental health records. Over-inclusive reporting policies (e.g., of diagnosis or outpatient treatment) infringe on medical privacy, deterring patients from seeking care.

Tracking individual mental health histories in federal and state databases contravenes the purpose of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), protecting against unauthorized disclosure of individual health information. HIPAA’s Privacy Rule 3 prohibits health care providers, plans, or clearinghouses (i.e., billing agencies) from disclosing identifiable health information without a patient’s written consent unless in connection with payment or treatment. Nonetheless, the Privacy Rule does not vitiate other laws requiring disclosure, such as the Brady Handgun Violence Prevention Act (creating the NICS database) or state laws requiring gun purchasers to waive confidentiality to mental health records. Identifiable health information may be released broadly as required by law for public health activities, in response to an order of a court, for law enforcement purposes, or to avert a serious threat to health or safety.

A system of gun control that relies on accessing mental health records threatens medical privacy. The confidentiality of mental health records is of paramount importance due to the stigma associated with mental illness; disclosure can result in personal embarrassment or even discrimination. Privacy protections are built into all federal and state laws that relate to mental health restrictions, but are at inherent tension with easily identifying prohibited persons at point of purchase. Having to balance the confidentiality of health records with the accessibility of a NICS database creates a perpetual tension.

Restricting the Sale of Firearms in the Wake of Heller & McDonald

Given the ineffectiveness of current restrictions on access to firearms for the “dangerously” mentally ill, the government must improve safeguards against firearm-related violence. The NRA’s approach—to arm the public—is an untenable solution, given the well-established correlation between gun ownership and fatalities, both intentional and accidental. While the current interpretation of the Second Amendment leaves us all at heightened risk for gun violence, Congress could enact sensible reforms to the Gun Control Act that would reduce the frequency with which widely available arms are inevitably placed in the wrong hands.

The NRA’s suggestion that public safety requires a universally armed public flies in the face of all available evidence. Every day, there is one death for every civilian-owned gun. The presence of a firearm in a home makes residents more likely to be fatally shot, whether accidentally or intentionally. Moreover, the attempt to filter arms out of the hands of the dangerous has failed; use of the NICS database has not lowered firearm-related homicide and suicides, even though the number of mentally ill persons listed has increased significantly since 2007. This is not surprising, given that most violent acts are not committed by the mentally ill. Fatalities have declined only in states with universally strict firearms control (e.g., Massachusetts, New York, and New Jersey). These effectual laws are the very type at risk of constitutional scrutiny, given the Court’s recent interpretation of the Second Amendment.

Thus, Congress should adopt five sensible reforms, which the Supreme Court would likely uphold: (1) ban large-sized ammunition magazines; (2) withhold state funding for inadequate privacy protections; (3) ensure more rapid and reliable background checks; (4) require longer waiting periods; and (5) close the gun show loophole.

Progress has begun: President Obama called for change in the wake of the attack on Representative Giffords, citing the need for a “faster and more reliable” background check system, and two bills recently introduced in the House and Senate would ban oversized ammunition magazines, penalize states for incomplete reporting to NICS, and prevent unregulated sellers from using gun shows as sales floors.

Conclusion

It is clear that a majority of the Supreme Court believes that the Second Amendment protects an individual right to bear arms, leaving governments to regulate dangerous persons, rather than dangerous weapons. Yet, the “longstanding prohibitions” against arms possession by the mentally ill do not keep guns out of the hands of the violent. Short of universal regulations, reliably keeping firearms out of the hands of the violent is impossible, but the struggle to protect the public’s health should not be defeated by the recent expansive interpretation of the Second Amendment. To the extent that restrictions within this scope will keep arms away from violent individuals, they offer reason for hope. And to the extent that restrictions further infringe on the mentally ill’s right to privacy without providing comprehensive arms control, they will likely do more harm than good.

---


Keeping Firearms Out of the Hands of the Dangerous Mentally Ill

By James B. Jacobs and Jennifer Jones*

The Tucson gunman, Jared Loughner, was acting erratically in the months before his murderous rampage. He posted frightening videos on YouTube and behaved strangely in some of his Pima College classes. In September 2010, college officials gave him an ultimatum: get mental health treatment or leave school. Loughner dropped out. Two months later, he purchased a firearm and, on January 8, 2011, killed six people and wounded fourteen, including Congresswoman Gabriele Giffords. In the national soul searching that followed, many people asked how such an obviously mentally disturbed person was able to purchase a firearm. This same question had attracted a great deal of attention just a few years before in the wake of a similar, even bloodier massacre at Virginia Tech University. On April 16, 2007, Seung-Hui Cho, a university senior, killed thirty-two people and wounded fourteen, including Congresswoman Gabriele Giffords. In the national soul searching that followed, many people asked how such an obviously mentally disturbed person was able to purchase a firearm.

These horrific incidents raise the question: Why has the regulatory system failed, and what, if anything, can be done to improve it?

Background

The 1968 Gun Control Act prohibited federally licensed firearms dealers from selling a gun to someone who had ever been “adjudicated as a mental defective” or “committed to a mental institution.” While these exclusions were obviously both over and under-inclusive, the law’s biggest deficiency was its reliance on the purchaser’s truthfulness. The 1993 Brady Law did not change the definition of persons prohibited from purchasing firearms on account of mental illness. However, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) issued regulations to clarify these terms: “[a]djudicated as a mental defective” means that a court, board, commission, or other lawful authority has determined that a person is “a danger to himself or others” or that a person “lacks the mental capacity to contract or manage his own affairs;” and “committed to any mental institution” does not include admission to a mental institution for observation or voluntary admission to a mental institution. Since voluntary hospitalizations far exceed court-ordered commitments, the Act and ATF regulations do not reach those mentally ill and dangerous persons who voluntarily check into a hospital and, of course, do not apply to all the mentally ill and dangerous persons who are not hospitalized.

Inadequacy of the NICS Database of Dangerously Mentally Ill Persons

The Brady Law ordered the attorney general to create within five years a screening system that could instantly advise a federally licensed firearms dealer whether a prospective gun purchaser is ineligible to purchase a firearm on account of criminal record, mental illness, or other disqualifying factor. NICS became operational in 1998. While it can check a purchaser’s identity against state and federal criminal record databases, there are no well-developed federal or state databases of people adjudicated mentally defective or involuntarily committed to mental institutions. NICS depends on the states to transmit the names of persons meeting the mental illness disqualification definition. States variously assign data collection and reporting responsibility to courts, state police, or state-level mental health agencies. Since this is not a core responsibility for any of these entities, they tend not to be diligent reporters.

NICS has never come close to having a comprehensive database of people who have been adjudicated as mentally defective or committed to a mental institution. In 2006, while an estimated 2.7 million Americans had been involuntarily committed to a mental institution at some point in their lives, NICS had only 235,000 names. Two years later, seventeen states still had not sent NICS any information on persons ineligible to purchase firearms on account of mental illness.

Many state-level mental health professionals believe that providing NICS with information about individuals who have been adjudicated mentally defective or civilly committed violates mental patients’ privacy rights or interests. Indeed, some states have privacy laws that explicitly prohibit disclosure of such information. Moreover, some state officials apparently believe that the federal Health Insurance Portability and Accountability Act (HIPAA) prohibits them from providing NICS with information about mental patients, despite HIPAA explicitly stating that its privacy provisions do not prohibit reporting to the FBI the names of persons with mental illness disqualifications.

Some mental health professionals oppose continued on next page

---

* James B. Jacobs is Warren E. Burger Professor of Law at New York University School of Law. Jennifer Jones is a 2010 graduate of New York University School of Law. This article was excerpted from Keeping Firearms Out of the Hands of the Dangerously Mentally Ill, 47 CRIM. L. BULL. 388 (2011).
reporting to the federal government names of persons adjudicated mentally ill because they believe it stigmatizes the reported individuals and deters people from seeking treatment. Some empirical studies challenge the assumption that individuals who have been adjudicated mentally defective or who have been committed to a mental hospital pose an elevated risk of misusing a firearm in the short term, much less many years after such events. They could point out that there are many people in American society (e.g., gang and organized crime members) who pose a much greater risk of engaging in future violence.

NICS reporting may also be hindered by state officials’ wariness about incurring the wrath of the gun-owners’ rights lobby, some of whose members have urged non-compliance with NICS on the ground that the actions of overzealous or incompetent federal bureaucrats may threaten legitimate ownership of firearms by persons with minor mental illnesses. For example, Gun Owners of America sent its members an email stating, “URGENT ALERT!!! Anti-Gun Zealots Trying to Ram Disarmament Bill Through Senate. Your ailing grandfather could have his entire gun collection seized, based only on a diagnosis of Alzheimer’s and there goes the family inheritance.”

The NICS Improvement Act of 2007

The Virginia Tech massacre set off a chorus of demands for improving state compliance with NICS. A number of states, including Virginia, acted quickly, either by executive order or legislation, to improve reporting. At the federal level, Congresswoman Carolyn McCarthy (D-NY) told her House colleagues that NICS did not prevent 91% of persons adjudicated mentally defective from purchasing firearms. She reintroduced a bill to provide federal grants to states wishing to computerize information on persons ineligible to purchase firearms. It also imposed financial penalties on states failing to meet new, more stringent, reporting standards. However, even the Virginia Tech massacre did not ensure the bill’s passage.

Ultimately, Senators Charles Schumer (D-NY), Patrick Leahy (D-VT), and Ted Kennedy (D-MA) brokered a compromise acceptable to the National Rifle Association. The amended bill prohibited the federal government from submitting “any record of an adjudication related to the mental health of a person or any commitment of a person to a mental institution if . . . the adjudication or commitment, respectively, has been set aside, expunged, or the person has otherwise been fully released or discharged from all mandatory treatment, supervision, or monitoring.” This provision is confusing. It says that hospitals and other authorities should not forward to NICS the names of persons who have successfully completed treatment. Does this mean that medical personnel and state and federal officials should wait some period of time to see if treatment has failed before transmitting and entering an individual’s name into the NICS database? If so, this could defeat the core purpose of the law. Any delay could give a dangerous mentally ill person an opportunity to purchase a firearm.

Another amendment required federal and state agencies to establish procedures whereby a disqualified individual can have his right to purchase a firearm restored. It provides: “a State court, board, commission, or other lawful authority shall grant relief, pursuant to State law and in accordance with the principles of due process, if . . . the person’s record and reputation, are such that the person will not likely act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest.” While restoration of the right to purchase a firearm should be an important part of the regulatory scheme, this vacuous provision leaves decision makers with unfettered discretion to determine whether to cancel the firearms disqualification.

The amended bill required that the state agency render a restoration decision within one year. If the agency fails to act “for any reason, including a lack of funds, the department or agency shall be deemed for all purposes to have denied such request for relief without cause, thereby allowing the petitioner to appeal to the federal courts.” If a petitioner successfully challenges his firearms disqualification, the federal government must purge any indication of the disqualification from its databases and pay the petitioner’s legal fees. It remains to be seen whether state agencies will be willing and able to competently make these restoration decisions and, if not, what federal court adjudication will entail.

With the NRA’s support, the amended bill sailed smoothly through the House and Senate. President George W. Bush signed it on January 8, 2008. In Fiscal Year 2010, Congress appropriated $20 million to implement the law’s goals. Between January 2008 and August 2010, almost half a million records of disqualifying mental illness were added to the NICS database. Nevertheless, the NICS database still includes just an estimated 30% of persons ever declared mentally defective or civilly committed. Moreover, the factors that have historically suppressed state reporting continue to exist. Nineteen states have privacy laws that prevent their own agencies from accessing certain mental health records; thirty-one states prohibit reporting certain mental health information to the FBI. The mental health treatment community’s attitude toward NICS remains lukewarm at best and hostile at worst. In addition, there continues to be confusion about which state mental health procedures trigger the NICS reporting requirement.

It Takes a Village

In a country with an estimated 300 million firearms in private hands and a constitutionally enshrined individual right to keep and bear arms, the challenge of preventing dangerous people from obtaining firearms is daunting. Possibly, even probably, our society might be marginally safer if NICS had a comprehensive database of persons having been adjudicated mentally defective or involuntarily committed to a mental institution on account of being a danger to self or others. It is conceivable that if NICS instructed a federally licensed firearms dealer not to complete a gun sale to an individual whose prior mental health adjudication rendered him too dangerous, a shooting rampage could be prevented. But it would take a tremendous regulatory effort to create such a comprehensive NICS database, and even if that goal could be achieved, there

continued on page 20
The Second Amendment Standard of Review: The Quintessential Clean-Slate for Sliding-Scale Scrutiny

By Michael J. Habib*

Introduction

The Second Amendment right to bear arms has been a source of debate and regulation since the adoption of the Bill of Rights. In McDonald v. Chicago, 130 S. Ct. 3020 (2010), the Supreme Court held that the Second Amendment is applicable to the states by virtue of the Fourteenth Amendment Due Process Clause. This is a remarkable deviation from previous holdings of the courts refusing to apply the Second Amendment to state legislation.

This decision will likely change the course of existing and future gun control legislation on the federal and state levels. Existing gun control laws seek to limit—and at times entirely prohibit—access to firearms, the ability to purchase, carry, or use firearms, and the frequency with which one may procure firearms. Frequency-of-purchase regulation may be the most suspect and ripe for constitutional review.

Currently, three states have laws that restrict the purchase of a handgun to one per month. These one-gun-per-month laws have not been constitutionally challenged post-McDonald, but an expansive reading of the decision calls into question the constitutionality of such laws.

In District of Columbia v. Heller, 554 U.S. 570, 636 (2008), and McDonald, the Court did not fully define the scope of the right and did not establish a level of scrutiny for challenges to gun laws. This leaves open the possibility that the Second Amendment right will be afforded the same strict scrutiny as other fundamental constitutional rights; or, perhaps more likely, the level of scrutiny will be something less than strict scrutiny, with the possibility for stringent regulation and restriction of gun ownership but not its absolute prohibition.

Based on prior precedent incorporating fundamental constitutional rights, the Court should define the right to bear arms as a right to possess almost any firearm (except those specifically for military use), at most locations (except sensitive locations such as schools and government buildings), for any lawful purpose in accordance with state and federal law. In addition, the Court should use a “sliding-scale” level of review to assess the constitutionality of laws infringing that right, where the level of scrutiny changes with the impact the regulation has on the core of the right. Under “sliding-scale” scrutiny, existing one-gun-per-month laws, which affect the core of the right to bear arms, should be reviewed with the strictest scrutiny and should be held to violate the Second Amendment.

Heller and McDonald

Assessing the constitutionality of a District of Columbia regulatory scheme that effectively prohibited the possession of loaded handguns, the Supreme Court held in Heller that the Second Amendment protects an individual right to possess and carry weapons in case of confrontation. The Court opined that the right to bear arms is not absolute and is subject to some restriction. The Court held that the type of weapons protected by the Second Amendment is restricted to those in common use at the time, which means the government may restrict the possession of sophisticated arms that are highly unusual in society.

The Court further held that some longstanding restrictions on the right to bear arms, such as possession by felons and carrying in sensitive locations, as well as conditions on the sale of firearms, are presumptively constitutional. However, the Court failed to establish a level of scrutiny for assessing the constitutionality of gun control laws, merely proffering that rational-basis scrutiny will not apply because such a low threshold has never been applied to a fundamental right.

Shortly after Heller, the Court in McDonald incorporated the Second Amendment right to bear arms against state action through the Due Process Clause of the Fourteenth Amendment. In so doing, the Court held that the right to bear arms is a fundamental constitutional right; however, the Court again did not assign a level of scrutiny to the right.

The Future of the Second Amendment

In the near future, the Court will undoubtedly clarify Second Amendment jurisprudence and establish a level of scrutiny for the right to bear arms. Because the Second Amendment heavily implicates policy concerns such as public safety, it is a unique opportunity to expand beyond the traditional levels of scrutiny. As such, the Second Amendment provides the quintessential “clean slate” to apply a rarely utilized level of judicial review that can be called “sliding-scale scrutiny.” Under sliding-scale scrutiny, the level of scrutiny utilized by a court in assessing the constitutionality of a restrictive regulation will vary between strict and intermediate scrutiny, based on the impact the regulation has on the core of the right.

* Michael J. Habib is a May 2012 graduate of the University of Connecticut School of Law, where he served as Notes & Comments Editor of the Connecticut Law Review, and is the author of The Future of Gun Control Laws Post-McDonald and Heller and the Death of One-Gun-Per-Month Legislation, 44 CONN. L. REV. 1339 (2012). The author may be reached at Michael.Habib@live.com

continued on next page
The Court in *Heller* and *McDonald* found that the core of the right to bear arms is the right to possess a loaded handgun in the home for self-defense. However, the Court did not reject the possibility that the right protected is broader, perhaps affording a right to possess most types of firearms for lawful purposes. Because the laws were challenged on the basis that they infringed the right to possess a handgun for self-defense, the Court narrowed its holding to those facts. However, in *McDonald*, the Court actually phrased its holding in *Heller* as, “the Second Amendment protects a personal right to keep and bear arms for lawful purposes,” *McDonald*, 130 S. Ct. at 3044, implying that even the Justices viewed their holding in *Heller* as more than just a protection of the right to bear arms for self-defense purposes—indeed, the right extends to all lawful purposes.

**Constitutionally Permissible Restrictions and Sliding-Scale Scrutiny**

Implicit in the scope of the right to bear arms is the government’s power to restrict that right. Even the most fundamental constitutional rights are subject to some form of regulation. The Court in *Heller* made clear that “the enshrinement of constitutional rights necessarily takes certain policy choices off the table . . . including the absolute prohibition of handguns held and used for self-defense in the home.” 554 U.S. at 636. However, the Court also stated that the right is not absolute. Therefore, there must be a middle ground where the government may restrict the right in a constitutionally permissible manner.

The Court gave a non-exhaustive list of regulations that are likely to be constitutionally reconcilable with the Second Amendment, including prohibiting possession by felons, carrying in schools and government buildings, and restricting the commercial sale of firearms. Indeed, the right to bear arms uniquely implicates social and public safety concerns to a greater extent than most other fundamental rights, making the right particularly subject to regulation.

As such, the Court must assign a level of scrutiny to the Second Amendment that will involve some type of means-ends analysis, appropriately balancing the right to keep and bear arms with the government’s interest in protecting public safety and security. The Court has primarily implemented three separate tests for determining whether restrictions on constitutional rights are proper: rational-basis, intermediate, and strict scrutiny. However, the Court has selectively used different levels of scrutiny that do not fall within these three categories, depending on the right itself, the interest asserted in restricting that right, and the degree of invasiveness of the restriction. One of these alternative tests, referred to herein as “sliding-scale scrutiny,” is the proper level of scrutiny for regulations restricting the right to bear arms.

The Court in *Heller* explicitly refused to establish a level of scrutiny, and in *McDonald* the Court did not even mention levels of scrutiny in its majority opinion. This is unusual because the possession of firearms is likely to be one of the few constitutional rights that is heavily regulated and restricted. If regulation and regulation is not constitutionally permissible, then *Heller* and *McDonald* call into question every state and federal gun-control law in existence.

Sliding-scale scrutiny is not a new invention. Rather, it has been utilized by the Court with regard to freedom of speech and the right to vote. While strict scrutiny is generally applied to laws that restrict the right to free speech and the right to vote, intermediate scrutiny is used in First Amendment regulations that target the time, manner, and place, but not content, of speech, and in ballot access cases when the issue is the right to appear on a ballot. This means that, for purposes of the First Amendment and the right to vote, undoubtedly fundamental rights, there are multiple levels of scrutiny that may apply.

Under a strict-scrutiny analysis, regulations that restrain a fundamental right presumptively violate that right. Under this exacting rule, most laws that severely restrict a fundamental right are held unconstitutional. Such a result would be disastrous for firearm regulatory schemes already in existence at the federal, state, and local levels. Folding the Second Amendment in with the fundamental rights already afforded strict scrutiny would require the government to prove the constitutionality of each gun control law. Therefore, it is unlikely that all infringements of the right to bear arms will be held to a strict-scrutiny analysis. Indeed, the Court has held that preventing crime and protecting the safety of citizens is a compelling government concern. Thus, even under strict-scrutiny, there is a de facto presumption that a narrowly tailored regulatory scheme devised for public safety furthers a compelling government interest.

Such a tortured review of every gun-control regulation is wasteful and imprudent. Instead, the Court should evolve an infrequently invoked level of scrutiny that falls somewhere between strict and intermediate scrutiny. In recent years, the Court has increasingly decided due process cases based on a list of factors that do not fit neatly within established levels of scrutiny. While often speaking of the levels of scrutiny directly, the Court employs gradations within the levels on a case-by-case basis. Sliding-scale scrutiny would balance the burden of government regulation in the interest of public safety with the fundamental right to bear arms and be a more fitting level of scrutiny for this unique right.

Ballot access and First Amendment cases provide paradigmatic examples of a sliding-scale standard of review, based on an analysis of the means sought to exercise the right. Application of this sliding-scale review is well suited to the Second Amendment because some methods of exercising the right should be afforded greater constitutional protection than others. Any regulation with the primary purpose or effective result of restraining the core of the right to bear arms should be held to strict scrutiny. Conversely, any law that does not restrict the primary purpose or core of the right, but rather regulates how one may exercise that right, should be held to intermediate scrutiny. The sliding-scale test, congruous with the Court’s...
holding that the central component of the Second Amendment is the right to defend self and home, will weigh the means by which one seeks to exercise the right to bear arms with the end result that the regulation will have on the interests protected by the right.

One-gun-per-month Laws
Statutory schemes restricting the lawful purchase of a handgun to one every thirty days date back over 30 years, with the express purpose of limiting the flow of arms used in crime from states with lax gun laws to states with more restrictive regulations. Currently, three states have such laws: California, Maryland, and New Jersey. However, of those three states, California remains one of the top-five sources of guns used in crime, and Virginia, which repealed its one-gun-per-month law in February 2012, also ranks in the top-five. Thus, such laws fail to further the government’s public safety interest, or at least are not the least restrictive and most effective means of achieving the end result.

Since such laws seek to limit the frequency with which one may exercise their constitutionally protected right to bear arms for self-defense, particularly vis-à-vis handguns, the most chosen arm in this nation for personal defense, the laws certainly touch upon the core of the right. Under sliding-scale review, they must then be reviewed under strict scrutiny. Because they fail to achieve their stated objective in the least restrictive means possible, such laws violate the Second Amendment.

Conclusion
Like many newly incorporated rights, Second Amendment jurisprudence is in its infancy and will continue to evolve. Some of the questions left unanswered by Heller and McDonald are: What exactly is the right protected by the Second Amendment? To what degree, and for what purposes, may the government abridge the right? And what is the proper level of scrutiny for assessing the constitutionality of laws that impinge upon the right to bear arms?

The right enshrined in the Second Amendment is a right to purchase, own, and carry almost any commonly available weapon, in almost any locale, for any lawful purpose. However, like every other fundamental constitutional right, it is not unlimited and unqualified. Some regulation of the right is appropriate, as the government has a compelling interest in protecting the safety of the people and may thus restrict the possession of firearms by felons, the mentally ill, and those deemed incapable of safely possessing a firearm through licensing schemes.

However, the Court gave no guidance in the form of a level of scrutiny for future courts to assess the constitutionality of gun regulations. Due to the nature of the right to bear arms, a fundamental right that uniquely implicates the government’s public safety interests, the Court should invoke a rarely applied judicial scrutiny called sliding-scale review. Under sliding-scale scrutiny, courts assess the constitutionality of a regulatory scheme restricting the right to bear arms in light of the effect it has on the exercise of the core right.

One-gun-per-month laws by their very nature seek to limit the frequency with which one may exercise his or her right to bear arms, and all such laws currently in effect target only handguns, the most frequently chosen weapon for personal defense. As such, these laws directly target the core of the right and must be reviewed with strict scrutiny. Since the purpose of such laws is to restrict the flow of illegal firearms into the hands of criminals, a purpose that has utterly failed, such laws are not narrowly tailored nor the least restrictive means of achieving the government interest and therefore must be struck down under strict scrutiny.

The right of self-defense is the central component of the right to bear arms, and thus any regulation that directly infringes that right must be held to strict scrutiny. However, when a regulation does not touch upon the core principles of the right, that regulation should be accorded more deference with regard to the government’s important interests, warranting a lesser level of scrutiny. This is the essence of sliding-scale review.

The Section values the input of all its members. Make your opinion count. Contact us at anne.kiefer@americanbar.org. Also, please let us know how we can help you get more involved with Section activities.
Amending the FOIA: Is it Time for a Real Exemption 10?

By Daniel J. Metcalfe*

The way the story goes, a young attorney begins working in an agency general counsel’s office and finds himself assigned to handle several Freedom of Information Act requests, one of which encompasses information that would embarrass the agency if disclosed but does not fall within any of the Act’s nine exemptions. “We should withhold it under Exemption 10,” he is told.

Or a grizzled veteran of an agency’s administrative law staff confronts a new political appointee who is hell-bent on withholding some FOIA-requested information and doesn’t particularly care how it is done, so long as it is. “Oh, you mean we should withhold it under Exemption 10, is that the idea?” comes the reply.

In either case, the message being conveyed is that those working in federal agencies sometimes feel, rightly or wrongly, that the Freedom of Information Act fails to provide adequate protection for every sensitive record or record portion that might be requested under it. And they tend to imagine, seriously or not, that just one more FOIA exemption would make the statute complete.

When Congress enacted the FOIA in 1966, after ten years of protracted legislative deliberation, it chose exactly nine categories of information that would be “exempt” from disclosure under the Act. From national security to personal privacy, from business confidentiality to law enforcement sensitivity, it established nine and only nine basic “exemption” exceptions to the Act’s disclosure mandate, with their contours destined to be the subjects of both Department of Justice policy interpretation and extensive judicial review.

Amendment of the FOIA on a Ten-Year Cycle

Over the years, of course, the FOIA has been amended several times—for decades on what seemed roughly limited to a ten-year cycle, i.e., 1966, 1974, 1976, 1986, 1996, 2007. And during those years, those major amendments of the Act further refined its many procedural aspects as well as several of its exemptions: Exemption 1 (indirectly in 1974), Exemption 3 (in 1976), and Exemption 7 (in 1974 and again in 1986). But Congress never saw fit to add a tenth FOIA exemption, even when the distinct need to protect “homeland security information” arose in the wake of September 11, 2001.

Rather, Congress and executive branch agencies have managed to avoid “opening the Act up” in that way by instead creating dozens of free-standing statutory provisions that serve as specific “disclosure prohibitions” under the FOIA’s third exemption. These so-called “Exemption 3 statutes” began to proliferate in the 1980s and 1990s, so much so that Congress was compelled to amend the FOIA in 2009, breaking the “ten-year cycle,” so as to rein in the enactment of such disclosure prohibitions. See The Cycle Continues: Congress Amends the FOIA in 2007, 33 ADMIN. & REG. L. News 11 (Spring 2008) (predicting that Congress might “break the mold” of what amounted to a 60-year-old legislative pattern—dating back to the 1946 birth of the APA and including Congress’s late-1955 commencement of legislative deliberations on what ten years later became the FOIA—“by revisiting the Act sooner than 2016, possibly even right away”), available at http://www.wcl.american.edu/lawandgov/cgs/documents/aba_arln_sp2008_cycle_continues.pdf?rd=1.

Now, though, for the first time in more than 30 years, it has been proposed that Congress should finally add to its original FOIA exemption list and enact a real Exemption 10 in order to address the realities of today’s post-9/11, “cyber-based” world. And the origin of this proposal lies not merely in the current threat of transnational terrorism, but rather in the limitation of what unfortunately was the most poorly drafted exemption of the Act’s original nine: Exemption 2.

Exemption 2 of the FOIA

The FOIA’s second exemption has long been viewed as the most poorly drafted of the nine. Unchanged since 1966, it covers “matters that are . . . related solely to the internal personnel rules and practices of an agency,” 5 U.S.C. § 552(b)(2), and stands as an ostensible “compromise” between two entirely different conceptions of it that developed in the House and the Senate. Briefly stated, the Senate viewed it as something that would shield agencies from the mere administrative burden of responding to requests for seemingly “trivial” agency activity, while the House saw it as a harm-based exemption (like all the others) for protecting information that is itself sensitive. Hence the development through FOIA case law of what became known as the “Low 2” / “High 2” dichotomy—a schizophrenic accommodation of two disparate views within a single exemption that by its terms ultimately effectuate neither.

* Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy (CGS), American University’s Washington College of Law; Contributing Editor, Administrative & Regulatory Law News; and Founding Director, United States Department of Justice’s Office of Information and Privacy (OIP).

1 Even at that, the U.S. FOIA was only the third national transparency regime in the world, after Sweden (1766) and Finland (which carried over Swedish law as an independent republic in 1919). Today, nearly 90 nations have such laws. See “International Transparency Community” (compilation maintained by American University Washington College of Law), available at http://www.wcl.american.edu/lawandgov/cgs/nations.cfm.
The judicial wellspring for this remarkable interpretation was the D.C. Circuit, which in its role as the circuit of “universal venue” under the FOIA issued an en banc decision in 1981 that, in the context of the exemption’s applicability to law enforcement manuals, purported to cure Congress’s drafting problem once and for all. To do that, the D.C. Circuit in Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051, 1072-74 (D.C. Cir. 1981) (en banc), found such a manual to fall within the “predominant internality” aspect of Exemption 2 and to warrant protection from potential wrongdoer harm on an “anti-circumvention of law” basis referred to as “High 2.” And by contrast, “Low 2” became the part of the exemption that allowed agencies just to avoid the administrative burden, the sheer bother, of disclosing purely “trivial” information. See Founding Church of Scientology v. Smith, 721 F.2d 828, 830-31 n.4 (D.C. Cir. 1983) (delineating the distinct burden-based contour of “Low 2” for “trivial administrative details”).

**The Rise and Fall of Crooker**

The Crooker decision had the virtue of rationalizing Congress’s failure fifteen years earlier with an interpretation that seemed plausible enough to FOIA requesters as well as workable for federal agencies—so much so that it became an explicit foundation for, rather than a target of, the legislative amendment activity that culminated in the FOIA Amendments of 1986. In fact, it was so “workable” for agencies that over the next two decades they managed to extend the “High 2” concept to protect records the disclosure of which would risk circumvention of not just criminal laws (as with Crooker’s criminal law enforcement manual), but also agency regulations, and then even agency enforcement policies in many instances, as well. And this “slippery slope” became extended from the realm of criminal law enforcement to that of civil and regulatory enforcement, and even to records

---


significant to the evenhandedness of some agency administrative activities.

Thus, by the time the nation was transformed by the horrific events of September 11, 2001, the broad Crooker “High 2” protections were fully entrenched both in FOIA case law and in agency administrative practice. So it was no surprise when the Department of Justice, as the agency responsible for Crooker’s extension, then immediately identified “High 2” as “available . . . protection for [agencies’] critical infrastructure information as they continue to . . . assess its heightened sensitivity; in the wake of the September 11 terrorist attacks.” FOIA Post, “New Attorney General FOIA Memorandum Issued” (posted 10/15/01), available at http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm.3

To say the least, the next decade saw “High 2” take on even greater significance to federal agencies, especially those charged with national security or law enforcement responsibilities, not to mention the blurred amalgam of the two into what soon became known as “homeland security.” Simply put, if “High 2” was a basic law enforcement device in 1981 when Crooker spawned it, and it then served as a pragmatic tool for the next 20 years as the Justice Department developed it, it became nothing less than a vital necessity in a post-9/11 world—one so broadly applied that it soon drew the critical attention of the open-government community. And by 2010, it had become increasingly clear to even the staunchest defenders of necessary government secrecy that Exemption 2’s interpretation, and even its well-motivated post-9/11 application, had been stretched to the point at which it was just too far unthroned from its actual statutory terms.

**The Milner Problem**

In fact, in June of 2010, the Supreme Court signaled as much when, over the government’s opposition, it granted certiorari in a “High 2” FOIA case. Indeed, Milner v. Department of the Navy, 131 S. Ct. 1259 (2011), was a case made to order for finally bringing the FOIA’s 45-year-old Exemption 2 problem to a head, as it involved “data and maps used to help store explosives at a naval base” that were of concern to the “surrounding community.” 131 S. Ct. at 1262, 1264. And predictably, in March of 2011, the Court ruled overwhelmingly that D.C. Circuit’s Crooker test actually had “no basis or referent in Exemption 2’s language,” that “the plain meaning of the term ‘personnel rules and practices’” is only “employee relations or human resources,” and that Exemption 2 simply cannot be “stretched” to include matters that have nothing to do with such things. Id. at 1262, 1267, 1271 (“We hold that Exemption 2 does not stretch so far.”).

To be sure, the fact that the government had come to rely so heavily on the breadth of “High 2” protection for nearly 30 years under Crooker was not lost on the Court, nor was the fact that (especially post-9/11) its evisceration “may force considerable adjustments.” Id. at 1271. This led the Court to identify possible partial solutions to the recognized problem that Congress “has not enacted the FOIA exemption the Government desires,” but ultimately to suggest that the government “seek relief from Congress.” Id. (“We leave to Congress, as is appropriate, the question whether it should [grant the relief sought].”)

**A Milner Solution**

It therefore came as an enormous surprise when the Obama Administration failed to propose any amendment of the FOIA, as a “Milner fix,” in the weeks and months after issuance of the Supreme Court’s decision. Not only was this contrary to what the Justice Department always had done to remedy serious problems throughout the FOIA’s history, it left federal agencies without protection for such core records as, for example, computer security vulnerability assessments (which cannot be protected under any other existing FOIA exemption). While the Department of Defense soon obtained narrow agency-specific protection for some of its own “critical

continued on next page
is a threat to public safety . . . isn’t it irresponsible
submitted a legislative proposal—if in fact there
could tell me why the Justice Department hasn’t
approached me or my staff about legislation
to ignore the problem?”

Committee Member Charles Grassley to
statement caused Ranking Senate Judiciary

But there is one thing more: Time is of
the essence in an enterprise such as this.
As the Justice Department now belatedly
admits, the need for a legislative remedy
to the Milner problem has become “criti-
cal.” And the additional fact that this now
is a presidential election year (in which
the Obama Administration can hardly
relish the thought of publicly fighting
for greater secrecy) just complicates
the legislative process further. Indeed, if
history is any guide, Congress’s effort to
make any substantive change to any of
the FOIA exemptions can be expected
to trigger all sorts of proposed exemption
“improvement” efforts, not the least of
which could be a serious effort by media
groups to finally reverse some now-anti-
quated aspects of the Supreme Court’s
landmark Reporters Committee decision.
See Dept of Justice v Reporters Comm,
(protection of personal privacy broadly in
multiple respects); see also Testimony of
Collaboration on Government
Secrecy Before House Committee on
Oversight and Government Reform at
5 n.15 (Mar. 17, 2011) (pointing out that
“opening up the FOIA’s exemptions’
[s]omething that has not been done
since the mid-1980s and . . . historically is
viewed with anxiety on both sides of the
wcl.american.edu/faculty/metcalf/

One thing is clear, however: The
FOIA’s original structure of nine basic
exemptions has largely withstood the
test of time and there is no true need
for a tenth. Hopefully, Congress will act
accordingly.

Exemption 2 Rewritten

So there is no reason for any part of
what used to be “High 2” to be given
new life in a FOIA Exemption 10; rather,
the Act’s second exemption stands as a
most appropriate location for whatever
Congress sees fit to restore of it, as well as
anything of relatively new cybersecurity
sensitivity. And a rewritten Exemption 2
need not be entirely one-sided: It could
contain a limiting “threshold requirement”
like several other FOIA exemptions (i.e.,
Exemptions 4, 5, 6, and 7), as well as a
relatively strong harm standard (i.e., “would,”
rather than “could reasonably be expected
to”) to weigh heavily against feared
overuse. In short, it could be something
along the lines of the following:

(b) This section does not apply to
matters that are . . . (2) of predominately
internal governmental significance, the
disclosure of which (A) would undermine
the personnel rules and practices of
an agency, (B) would expose a cyberse-
curity or computer security vulnerability
of an agency, or (C) would be expected
to risk harm to a government facility, system,
or other national asset that is of critical
importance to homeland security.

Right now, in the wake of Milner,
Exemption 2 is but a mere shell of what it
was under Crooker: It covers information
about agency “personnel” matters only
(as defined by the Court to mean just
relatively routine matters of “employee
relations or human resources”), and it
affords federal agencies absolutely none
of the broad “anti-circumvention”
protection that “High 2,” especially in
the homeland security context, came to
afford. In fact, both “High 2” and “Low
2” are gone; the latter is a “dead letter”
as well, if for no other reason than that
the Obama Administration’s “foreseeable
harm” policy standard for FOIA exemp-
tion use logically precludes the use of
any exemption aspect that is based upon
sheer burden rather than harm. See, e.g.,
FOIA Update, Vol. XV, No. 2, at 3 (Spring
1994) (advising that identical “foreseeable
harm” standard of Clinton Administration
precluded Exemption 2 “in its entire ‘Low
2’ aspect,” though subsequently understated
in Obama Administration counterpart
guidance as only a “general rule”).

5 U.S.C. § 552(b)(2) (as proposed to be
revised, with existing language not itali-
cized). And it could be a final, pragmatic
solution to a problem that, at its outer
edge, has been more than 65 years in
the making.5

4 The very belatedness of this Justice Department
statement caused Ranking Senate Judiciary
Committee Member Charles Grassley to
rhetorically ask: “[T]he Milner case was released
more than a year ago [but] the Justice Department
hasn’t approached me or my staff about legislation
to address the impact of the decision, so maybe you
could tell me why the Justice Department hasn’t
submitted a legislative proposal—if in fact there
is a threat to public safety . . . isn’t it irresponsible
to ignore the problem?”

5 In fairness to Congress—or at least the
89th Congress that enacted the FOIA—the
language that it chose for Exemption 2 closely
mirrored language that had been part of the
Administrative Procedure Act since 1946. See
5 U.S.C. § 552 (1964 ed.) (creating broad
nondisclosure presumption for “any matter
relating solely to the internal management
of an agency”). To some, however, that was no
small part of the problem to begin with.
A review of the book:  
**The Law of Counterterrorism**  
*Editor, Lynne K. Zusman*  
*American Bar Association.*  
320 pp. $39.95

The ten years following 9/11 have created an opportunity for a sober reflection about where U.S. counterterrorism law was before the attacks, where it has been since, and how elements of it are likely to evolve as the terrorist threat changes and the United States’ own understanding of best legal counterterrorism practices develops. The Lynne K. Zusman-edited volume, *The Law of Counterterrorism*, explores these vistas with a series of essays, some of which reach deep into the legal frameworks that support counterterrorism law, and some of which speak on the surface—and with some star power—about how counterterrorism law was practiced after 9/11 and still is being applied today. In all, the volume is an important contribution to our understanding of counterterrorism law and merits inclusion in law school curricula, particularly for introductory courses in international law or as a primer for more advanced law, graduate, or military sciences courses with a specific focus on American counterterrorism law and practice.

The strengths of the book are many, but none more so than three centerpiece essays that reach deep into the history of U.S. counterterrorism law and policy. W. Hays Parks’ introductory piece in the volume provides a finely rendered and delicately parsed discussion that makes a compelling legal case—relying on both domestic and international law—for the United States defining al-Qaeda and its collaborators operating trans-nationally as enemy combatants. Parks’ essay is particularly notable because it affirms that the U.S. rightly defined al-Qaeda members as enemy combatants, but challenges the grounds upon which it did so, arguing that the Bush Administration came to the right conclusion but for the wrong reasons. Parks’ essay is provocative, rigorous, and well crafted.

W. George Jameson’s sweep of the organization of the U.S. security apparatus before and after 9/11 points to its continued evolution and development. Jameson highlights the gaps—jagged interpretations of Foreign Intelligence Surveillance Act (FISA) provisions, continued tensions between the legalistic and probabilistic approaches within the FBI and CIA—and how the fragile connective tissue across the intelligence and legal communities has grown and developed (without fully maturing) since 9/11. Jameson’s entry into FISA and signals intelligence is more fully developed in Bridwell and Jaffer’s concluding essay, which provides a detailed narrative of the early development, extraordinary growth and even abuse, and now more stabilized and thoughtful contraction of the laws authorizing and governing surveillance of suspected terrorists and terrorist collaborators. The volume merits serious investment and consideration for the Parks, Jameson, and Bridwell and Jaffer pieces alone.

Where the volume is particularly successful, however, is in an unintentional but important place: in its overall description of the banality of counterterrorism law and practice. Echoing—without ever mentioning—Hannah Arendt’s famous post-WWII philosophical work, this volume puts into clear focus how some very extraordinary things (rendition, detention, interrogation, and violations of international law in each of those) became ordinary and acceptable because of the presence of legal opinions and legal counsel at every turn in the post-9/11 road. Huckabee and Davidson in their essay provide a strong rendering of this banality of legal backstopping by highlighting how those making the extraordinary decisions in the days and months after 9/11 did so under cover—and plausible deniability—of counsel. In many ways, legal counsel was the final and authoritative word even when, as Parks notes, the advice was crafted from the wrong premises or faulty caselaw research. Huckabee and Davison implicitly suggest in their essay that legal counsel—perhaps to a greater degree than the elected officials charged with making decisions—were the last and final word permitting precedent-setting and sometimes illegal policy decisions to proceed.

Finally, the volume has flashes of star power. New York City Police Commissioner Raymond W. Kelly provides a brief boots-on-the-ground account of how counterterrorism law informed his activities, which is a welcome contribution to the volume.
city's successful defense of its subways, bridges, and infrastructure in the ten years after the 9/11 attacks. While the Kelly essay is short on detail, Zusman's inclusion of the chapter provides a nice palate cleanser after the denser—and more rewarding—Parks essay. Gordon Lederman—who served on the staff of the 9/11 Commission—provides a breezy overview of the National Security Council structure and how it leaves the United States still vulnerable to 21st Century terrorist threats. As with the Kelly chapter, the Lederman essay provides a surface glance at gaps that would likely have been a much longer and rewarding discussion had Lederman been at liberty to share some of the richer 9/11 Commission deliberations.

While there is much to like, the volume is missing some important discussions and details that one might expect in a survey of the law of counterterrorism. First, there is little that speaks to comparative counterterrorism law. Allies such as the French and British over the past century have developed robust counterterrorism infrastructures in response to terrorist threats in Algeria and Ireland, respectively. This volume would have benefitted from putting the United States' counterterrorism policy in those frameworks and doing comparative statics work to demonstrate if (and how) the U.S. approach in the post-9/11 period either was evidence of American exceptionalism or simply an extension of past best practices in counterterrorism law and policy.

The volume also mentions the use of Predator drones but does little justice to the growing practice of extra-judicial killings outside of the United States' borders. This omission is particularly problematic given that the United States in the summer of 2011 used a Predator drone strike to conduct a targeted killing of U.S. citizen Anwar al-Awlaki, in Yemen. Awlawki allegedly had connections to the 9/11 hijackers and a series of individuals arrested subsequent to 9/11 for terrorism plotting. Even with these connections and perhaps clear evidence of terrorist plotting against the United States, Awlawki retained all of his due process rights as an American citizen despite having fled to Yemen and having plotted against the United States there. Such strikes against American citizens raise serious questions about due process that merits continued debate and discussion in volumes such as this.

Finally, the volume would have benefitted from a lead or concluding essay that tied together all of the essays in the volume into a coherent whole. One gap that such an essay could have filled—and that was evident throughout the volume—was a philosophical discussion of the delicate balance between counterterrorism law and practice and the tradeoffs that naturally occur between security and liberty. Such an essay would have provided a backbone and context to the volume that could have illuminated why the essays were included and how, after reading the volume, our understanding of these tradeoffs could be augmented through the authors' contributions.

Overall, however, the volume is a strong contribution to our understanding of the growth, development, and continuing evolution of counterterrorism law. It merits consideration by students and scholars who desire a primer and entry point into terrorism and counterterrorism law.

Keeping Firearms Out of the Hands of the Dangerous Mentally Ill continued from page 12

are many ways, other than by purchasing from a federally licensed firearms dealer, that a dangerous person who doesn’t already have a firearm could obtain one. For example, he could purchase a firearm (no questions asked) from a private non-federally licensed firearms dealer or buy/borrow a gun from a friend.

In passing the 1968 Gun Control Act, Congress did not think through the relationship between mental illness and dangerousness or the logistical difficulties of preventing dangerous mentally ill individuals from obtaining a firearm or other weapon. It probably seemed obvious at that time that seriously mentally ill people should not have guns. In fact, research has now cast doubt on the assumption that, as a class, people with an official record of serious mental illness are more violence-prone than people with no such record. While a significant percentage of Americans at some point in their lives are diagnosed as suffering from a mental illness and an even larger percentage at some point seek assistance from a mental health professional, people falling into these categories account for only a small fraction of all violent conduct. Prior criminal record and drug abuse, for example, are much better predictors of future violence.

Of course, some mentally ill (and non-mentally ill) people are dangerous. However, the threat that they pose cannot be erased, or probably much reduced, merely by better regulating federally licensed firearms dealers. From a societal standpoint, it would be highly desirable for there to be a medical intervention before their violence materials. Admittedly, not every therapeutic intervention will be successful, but some mentally ill individuals who are headed toward an eruption of irrational violence might be calmed and stabilized by contact with a psychiatrist, psychologist, or social worker. In a country where the means for engaging in mass violence is readily available, the citizenry should be strongly encouraged not to ignore individuals whose behavior is frightening or bizarre—be they roommates, classmates, students, relatives, or friends. It should be considered responsible citizenship to urge a person who is acting bizarrely to make contact with a mental health professional, even accompanying that person to a clinic or therapist. If that is not appropriate, a responsible response is to inform school, college, or company officials. They, in turn, should seek to direct such persons to treatment or, in extreme situations, call the police. The police will decide whether to take a strangely-behaving individual to a hospital where, if necessary, a civil commitment procedure can be initiated. The point is that societal defense from deranged mass murderers requires the mobilization of societal vigilance and action.
Program Chair: Harold Krent  ★  Section Chair: Michael Herz

Please Join Us for:
★ 4.5 Hours of Continuing Legal Education
★ Annual Section Dinner & Reception
★ Section Council Meeting

<table>
<thead>
<tr>
<th>Friday, August 3, 2012 — CLE Programs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hyatt Regency Chicago — Comiskey, Bronze Level, West Tower</td>
</tr>
<tr>
<td><strong>8:30 a.m. – 10:00 a.m.</strong></td>
</tr>
<tr>
<td><strong>2:00 p.m. – 3:30 p.m.</strong></td>
</tr>
<tr>
<td><strong>3:45 p.m. – 5:15 p.m.</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Friday, August 3, 2012 — Evening Events</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>6:30 p.m. – 9:30 p.m.</strong></td>
</tr>
<tr>
<td><strong>10:00 p.m. – 11:30 p.m.</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Saturday, August 4, 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairmont Hotel</td>
</tr>
<tr>
<td><strong>8:00 a.m. – 12:30 p.m.</strong></td>
</tr>
<tr>
<td><strong>10:00 p.m. – 11:30 p.m.</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Sunday, August 5, 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairmont Hotel — Imperial Ballroom B2 Level</td>
</tr>
<tr>
<td><strong>8:30 a.m. – 11:30 a.m.</strong></td>
</tr>
<tr>
<td><strong>11:30 a.m. – 12:00 p.m.</strong></td>
</tr>
</tbody>
</table>
By Robin Kundis Craig*

The Supreme Court decided several cases this quarter directly involving the Administrative Procedure Act (APA). These cases turned on issues as disparate as whether the APA applies to judicial review at all, whether an agency had taken final agency action, and whether a federal statute precludes APA review. Two other cases added to the Court’s continuing exploration of the relationship between federal agencies and the federal courts on questions of interpreting and applying statutes, with one case indicating that federal agency pronouncements on preemption must be respected and the other indicating that the Court’s prior interpretations of statutes block agencies’ authority to issue new regulatory interpretations later; both decisions, however, badly split the Justices. Finally, the Court gave guidance on the availability of the “political question” doctrine as a basis for dismissing federal court cases and limited Congress’s ability to abrogate State sovereign immunity.

Availability of Judicial Review

In Sackett v. Environmental Protection Agency, 132 S. Ct. 1367 (2012), the Court unanimously concluded that landowners may challenge a compliance order from the Environmental Protection Agency (EPA) as a final agency action under the APA. Id. at 1374. EPA issued the order pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387, attempting to force the Sacketts to re-create a wetland that they had filled on their property without a permit. Id. at 1370-71. EPA denied the Sacketts a hearing on the issue of whether Clean Water Act jurisdiction existed; then the District Court for the District of Idaho dismissed the Sacketts’ APA lawsuit for lack of subject matter jurisdiction and was affirmed by the Ninth Circuit. Id. at 1371.

The Court first determined that the compliance order was final agency action subject to challenge under the APA. According to the Court, the order has all of the hallmarks of APA finality that our opinions establish. Through the order, the EPA “‘determined’” “‘rights or obligations.’” By reason of the order, the Sacketts have the legal obligation to “restore” their property according to an agency-approved Restoration Work Plan, and must give the EPA access to their property and to “records and documentation related to the conditions at the Site.” Also, “‘legal consequences . . . flow’” from issuance of the order. For one, according to the Government’s current litigating position, the order exposes the Sacketts to double penalties in a future enforcement proceeding. It also severely limits the Sacketts’ ability to obtain a permit for their fill from the Army Corps of Engineers. The Corps’ regulations provide that, once the EPA has issued a compliance order with respect to certain property, the Corps will not process a permit application for that property unless doing so is “clearly appropriate.”

The issuance of the compliance order also marks the “‘consummation’” of the agency’s decisionmaking process. As the Sacketts learned when they unsuccessfully sought a hearing, the “Findings and Conclusions” that the compliance order contained were not subject to further agency review. The Government resists this conclusion, pointing to a portion of the order that invited the Sacketts to “engage in informal discussion of the terms and requirements” of the order with the EPA and to inform the agency of “any allegations [t]herein which [they] believe[d] to be inaccurate.” But that confers no entitlement to further agency review. The mere possibility that an agency might reconsider in light of “informal discussion” and invited contentions of inaccuracy does not suffice to make an otherwise final agency action nonfinal. Id. at 1371-72 (citations and footnotes omitted).

The Court then considered whether the Sacketts had some other adequate remedy that would displace their APA lawsuit. Because the EPA had not brought an enforcement action under the Clean Water Act, and because applying for an Army Corps permit would not constitute an adequate remedy for EPA’s assertion of jurisdiction, the Sacketts had no other remedy. Id. at 1372.

Finally, the Court considered whether the Clean Water Act precludes judicial review of EPA compliance orders. It first noted that nothing in the Clean Water Act expressly precludes such review, and it noted the presumption in favor of judicial review of agency actions. Id. at 1372-73. However, it also considered the government’s arguments in favor of implicit preclusion: (1) the Clean Water Act gave EPA the choice of whether to proceed with enforcement in court or administrative enforcement, and judicial review would undermine that choice; (2) compliance orders are not self-executing, forcing EPA into court if it wanted to pursue further enforcement; (3) Congress provided for prompt judicial review after EPA imposed civil penalties on a violator; and (4) compliance orders help to quickly achieve Congress’s remedial purpose in the Clean Water Act—eliminating water pollution. Id. at 1373-74. The Court found none of these arguments convincing, concluding that “[t]he APA’s presumption of judicial review is a repudiation of the principle that efficiency of regulation conquers all. And there is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into ‘voluntary compliance’ without the opportunity for judicial review—even judicial review of the question whether the regulated party is within the EPA’s jurisdiction.” Id. at 1374.

Five days after deciding Sackett, the Court decided that the “political question” doctrine did not bar judicial review in Zivot-
ofsky v. Clinton, 132 S. Ct. 1421 (2012), a case that on the merits questioned the ability of parents to force the Secretary of State to identify their child’s birthplace as “Jerusalem, Israel” on the child’s passport, contradicting a longstanding Department of State policy of not identifying Jerusalem as belonging to Israel. Id. at 1424–26. The U.S. District Court for the District of Columbia dismissed the case originally on grounds of lack of standing and nonjusticiability on the basis of the political question doctrine, concluding that resolution of the case would force it to decide the status of Jerusalem. Id. at 1426. While the Court of Appeals for the D.C. Circuit reversed the standing decision, it eventually affirmed the dismissal on the basis of the political question doctrine. Id.

The Court reversed, 8–1, in a six-Justice opinion authored by Chief Justice Roberts, with concurrences in the judgment by Justices Sotomayor and Alito; Justice Breyer dissented. The majority emphasized that “the Judiciary has a responsibility to decide cases properly before it,” id. at 1427, characterizing the political question doctrine as a “narrow exception” to that general rule. Id. It further explained that “a controversy ‘involves a political question . . .where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” Id. (quoting Nixon v. United States, 506 U.S. 224, 228 (1993) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962))). No such political question was present in this case, according to the Court, because the case could be resolved solely by: (1) interpreting and applying § 214(d) of the Foreign Relations Authorization Act, which states that “[f]or purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel”; and (2) determining whether this provision is constitutional. Id. at 1427–28. Because the lower courts had not ruled on these issues, especially the constitutional issue, the Court remanded the case to the D.C. Circuit. Id. at 1431.

Justice Sotomayor concurred in the judgment but argued that the political question doctrine is far more complex than the majority allowed, arguing that a six-factor test applied instead. Id. at 1341–45. Justice Alito concurred in the judgment, but framed the issue far more narrowly than the majority—“namely, whether the statutory provision at issue infringes the power of the President to regulate the contents of a passport.” Id. at 1346. Justice Breyer dissented, agreeing with Justice Sotomayor that the six-factor test for the political question doctrine applied but concluding that the case did indeed raise political questions that were not justiciable in the courts. Id. at 1437–41.

Federal Agencies and Federal Preemption

In its latest installment of cases discussing the relationship between federal agency actions and federal preemption, the Court decided 5–4 to remand a court of appeals decision on preemption because the federal agency involved acted on the preemption issue after the Court granted certiorari. Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1207–08 (2012). In this case, Medicaid beneficiaries and providers sued under the Supremacy Clause to challenge California statutes that reduce payments to providers, arguing that those state laws conflicted with federal Medicaid statutes. The Ninth Circuit upheld the plaintiffs’ claims, id. at 1209, and the Court granted certiorari to determine whether the plaintiffs had a cause of action. However, after oral argument but before the Court decided the case, the Centers for Medicare and Medicaid Services (CMMS), the federal agency in charge of administering Medicaid, approved California’s statutes, deeming them consistent with federal law. Id. at 1207, 1209.

According to the Court majority, in an opinion by Justice Breyer, the CMMS’s intervention potentially changed the issues in the case. As it explained:

While the cases are not moot, they are now in a different posture. The federal agency charged with administering the Medicaid program has determined that the challenged rate reductions comply with federal law. That agency decision does not change the underlying substantive question, namely whether California’s statutes are consistent with a specific federal statutory provision (requiring that reimbursement rates be “sufficient to enlist enough providers”). But it may change the answer. And it may require respondents now to proceed by seeking review of the agency determination under the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., rather than in an action against California under the Supremacy Clause.

Id. at 1210. Suit under the APA, the Court noted, “would likely permit respondents to obtain an authoritative judicial determination of the merits of their legal claim.” Id. More importantly, the CMMS’s opinion on the preemption question was now entitled to “ordinary standards of deference,” even though the Ninth Circuit had given no weight to the government’s interpretation of the statute. Id. Remanding to allow deference to the CMMS’s view would, the majority concluded, avoid potential inconsistencies of application. Id. at 1210–11.

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito. They would have reached the question presented to the Court—namely, whether the Supremacy Clause provides its own cause of action to challenge state statutes when the federal statutes at issue do not provide a private right of action. Id. at 1213–14. The dissenters would have concluded, moreover, that “[w]hen Congress did not intend to provide a private right of action to enforce a statute enacted under the Spending Clause, the Supremacy Clause does not supply one of its own force. The Ninth Circuit’s decisions to the contrary should be reversed.” Id. at 1215.

continued on next page
Federal Abrogation of State Sovereign Immunity

The Court revisited the issue of when and how Congress may abrogate State sovereign immunity in Coleman v. Court of Appeals of Maryland, 132 S. Ct. 1327 (2012). In what was essentially a 4–1–4 decision (Justice Scalia concurred in the judgment but nothing else), the Court concluded in an opinion authored by Justice Kennedy—“[i]n agreement with every Court of Appeals to have addressed this question”—that Congress had not abrogated States’ sovereign immunity through the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601 et seq., with respect to the FMLA’s self-care provisions. 132 S. Ct. at 1332. Usefully, the Court summarized the rules regarding abrogation pursuant to § 5 of the Fourteenth Amendment:

A foundational premise of the federal system is that States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense. As an exception to this principle, Congress may abrogate the States’ immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment.

Congress must ‘‘mak[e] its intention to abrogate unmistakably clear in the language of the statute.’’ On this point the Act does express the clear purpose to abrogate the States’ immunity. Congress subjected any ‘‘public agency’’ to suit under the FMLA, 29 U.S.C. § 2617(a)(2), and a ‘‘public agency’’ is defined to include both ‘‘the government of a State or political subdivision thereof’’ and ‘‘any agency of . . . a State, or a political subdivision of a State,’’ §§ 203(x), 2611(4)(A)(iii).

The question then becomes whether the self-care provision and its attempt to abrogate the States’ immunity are a valid exercise of congressional power under § 5 of the Fourteenth Amendment. Section 5 grants Congress the power ‘‘to enforce’’ the substantive guarantees of § 1 of the Amendment by ‘‘appropriate legislation.’’ The power to enforce ‘‘includes the authority both to remedy and to deter violation[s] of rights guaranteed’’ by § 1. To ensure Congress’ enforcement powers under § 5 remain enforcement powers, as envisioned by the ratifiers of the Amendment, rather than powers to redefine the substantive scope of § 1, Congress ‘‘must tailor’’ legislation enacted under § 5 ‘‘to remedy or prevent’’ ‘‘conduct transgressing the Fourteenth Amendment’s substantive provisions.’’

Whether a congressional Act passed under § 5 can impose monetary liability upon States requires an assessment of both the ‘‘evil’ or ‘wrong’ that Congress intended to remedy, and the means Congress adopted to address that evil. Legislation enacted under § 5 must be targeted at ‘‘conduct transgressing the Fourteenth Amendment’s substantive provisions.’’ And ‘‘[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’’

Id. at 1333–34 (citations omitted). According to the plurality, the FMLA failed this ‘‘means–ends’’ test with respect to self-care leave because: (1) states had not been facially discriminatory in their self-care leave policies before the FMLA; (2) there was no evidence that employers would assume that women would make more use of the self-care leave than men, in conjunction with family leave, making the two provisions inseparable; and (3) a disparate impact on women who are single parents does not constitute evidence of discrimination. Id. at 1334–38. As a result, there was no pattern of discrimination for Congress to remedy, and hence no need to abrogate state sovereign immunity. Id. at 1338.

Justice Scalia concurred in the judgment but under different reasoning.

I adhere to my view that we should instead adopt an approach that is properly tied to the text of § 5, which grants Congress the power ‘‘to enforce, by appropriate legislation,’’ the other provisions of the Fourteenth Amendment. (Emphasis added.) As I have explained in greater detail elsewhere, outside of the context of racial discrimination (which is different for stare decisis reasons), I would limit Congress’s § 5 power to the regulation of conduct that itself violates the Fourteenth Amendment. Failing to grant state employees leave for the purpose of self-care—or any other purpose, for that matter—does not come close.

Id. at 1338–39 (citation omitted).

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. Emphasizing that ‘‘[t]he Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to 12 weeks of job-secured leave during any 12-month period: (A) to care for a newborn son or daughter; (B) to care for a newly adopted son or daughter; (C) to care for a spouse, child, or parent
with a serious health condition; or (D) because the employee has a serious health condition that makes her unable to perform the functions of her position,” id. at 1339 (Ginsburg, J., dissenting) (citing 29 U.S.C. § 2612(a)(1)), the dissenters concluded that, “[e]ven accepting this Court’s view of the scope of Congress’ power under § 5 of the Fourteenth Amendment, I would hold that the self-care provision, § 2612(a)(1)(D), validly enforces the right to be free from gender discrimination in the workplace.” Id.

Statutory Interpretation

The meaning of the term “award” was the focus in Roberts v. Sea-Land Services, Inc., 132 S. Ct. 1350 (2012):

The Longshore and Harbor Workers’ Compensation Act (LHWCA or Act), ch. 509, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq., caps benefits for most types of disability at twice the national average weekly wage for the fiscal year in which an injured employee is “newly awarded compensation.” § 906(c). We hold that an employee is “newly awarded compensation” when he first becomes disabled and thereby becomes statutorily entitled to benefits, no matter whether, or when, a compensation order issues on his behalf.

Id. at 1353–54. The dispute in the case centered on whether petitioner Dana Roberts was entitled to weekly wages based on the national average in 2002, when he became disabled ($966.08 per week, the figure awarded by the ALJ and upheld by both the Department of Labor’s Benefits Review Board and the Ninth Circuit), or the national average in 2007, the year he was awarded benefits ($1114.44 per week). Id. at 1355.

In an 8–1 opinion authored by Justice Sotomayor, the Court affirmed the lower decisions. The Court began with a plain meaning analysis of § 906(c), focusing on the word “award,” and concluded that the meaning of the section was “indeterminate.” Id. at 1356–57. It then looked at § 906(c) in the larger context of the LHWCA, concluding that “[i]n the context of the LHWCA’s comprehensive, reticulated regime for worker benefits—in which § 906 plays a pivotal role—‘awarded compensation’ is much more sensibly interpreted to mean ‘statutorily entitled to compensation because of disability.’” Id. at 1357. In addition, the Court’s interpretation served policy goals of avoiding having similarly situated claimants treated differently and avoiding gamesmanship in the claim process. Id. at 1359–60.

Justice Ginsburg dissented. She opted for an interpretation promoted by neither the claimant nor the rest of the Court. Specifically, Justice Ginsburg would have held “that an injured worker is ‘newly awarded compensation’ when (1) the employer voluntarily undertakes to pay benefits to the employee, or (2) an administrative law judge (ALJ), the Benefits Review Board (BRB), or a reviewing court orders the employer to pay such benefits.” Id. at 1363–64.

Chevron

The Court revisited the issue of whether federal agencies can “overrule” by regulation federal court interpretations of statutes in United States v. Home Concrete & Supply, LLC, 2012 WL 1413964 (Apr. 25, 2012), strongly suggesting that its own statutory interpretations are not subject to agency “override.” The case involved the statute of limitations in tax cases, which can be extended from three to six years for the government if the taxpayer omits from gross income an amount in excess of 25% of the gross income actually reported. 26 U.S.C. § 6501(a). (e). The question for the Court was whether the extended statute of limitations applied when a taxpayer overstated his basis in an asset and hence underreported a gain. It held, in essentially a 4–1–4 split in which Justice Scalia concurred in the judgment, that the normal three-year statute of limitations governed. 2012 WL 1413964, at *2.

Where the Court split, however, was the relevance of the Court’s prior decision in Colony, Inc. v. Commissioner, 357 U.S. 28 (1958)—which essentially decided the same issue for a prior version of the Tax Code—in light of the December 2010 issuance of Treasury Regulation § 301.6501(e)–1, 26 C.F.R., § 301.6501(e)–1, which contradicted Colony. Because this was a formal regulation adopted by the federal agency that implements the Tax Code, the government demanded Chevron deference in light of National Cable & Telecommunications Ass’n v. Brand X Internet Services, 545 U.S. 967, 982 (2005), which determined that only a court interpretation based on the unambiguous language of a statute could foreclose an agency’s contrary interpretation—and in Colony, the Court had admitted ambiguity. 2012 WL 1413964, at *6. However, an unusual alignment of Justices Breyer (author), Roberts, Alito, Thomas, and Scalia refused to accord the IRS Chevron deference, concluding that “[i]n our view, Colony has already interpreted the statute, and there is no longer any different construction that is consistent with Colony and available for adoption by the agency.” Id. at *7. Four of these Justices (not including Justice Scalia) further went on to reinterpret Colony as not acknowledging that the statute left any gap for the agency to fill. Id. at *7–9.

Justice Scalia, although concurring in the judgment, found the four Justices’ reinterpretation of Colony—and their attempt to uphold both Colony and Brand X—untenable. In his opinion, “[i]nstead of doing what Brand X would require, however, the plurality manages to sustain the justifiable reliance of taxpayers by revising yet again the meaning of Chevron—and revising it yet again in a direction that will create confusion and uncertainty.” Id. at *10 (citations omitted). Justice Scalia, in contrast, would have simply overruled Brand X. Id. at *11.

Justice Kennedy, joined by Justices Ginsburg, Sotomayor, and Kagan, would have displaced Colony in favor of the new regulation. However, they would have done so on the basis of post-Colony statutory amendments, not the Brand X rule. Id. at *15 (Kennedy, J., dissenting). As Justice Kennedy emphasized: “Our legal system presumes there will be continuing dialogue among the three branches of Government on questions of statutory interpretation and application,” and “[t]hese instructive exchanges would be foreclosed by an insistence on adhering to earlier interpretations of a statute even in light of new, relevant statutory amendments.” Id. at *16.
Fourth and Fifth Circuits Address Agency Discretion in Choosing Rulemaking or Adjudication

By William S. Jordan III*

Usually, the distinction between rulemaking and adjudication is straightforward. As a matter of due process analysis, the courts give primary attention to the question of whether the parties will be “exceptionally affected . . . upon individual grounds.” Londoner v. City & County of Denver, 210 U.S. 373 (1908). If so, the decision constitutes adjudication to which due process may apply. The question can change, however, when the issue is not due process, but whether an agency action constitutes rulemaking or adjudication under the Administrative Procedure Act or another statute.

The Fifth Circuit recently struggled with this issue in City of Arlington v. FCC, 668 F.3d 229 (5th Cir. 2012), in which the Federal Communications Commission issued, without notice and comment, a Declaratory Ruling establishing time frames for states and localities to act on wireless facility siting applications. This is classic rulemaking in the sense that it meets the definition of a “rule” in § 551(4) of the APA, it affects all states and localities that must deal with wireless facilities, and the decision is not based upon “individual grounds” related to any particular party. Nonetheless, the Fifth Circuit accepted the FCC’s characterization as “adjudication.” The court based its conclusion on the fact that the FCC had explicitly acted pursuant to § 554(e) of the APA, which provides:

The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

In so doing, the court relied upon American Airlines, Inc. v. Department of Transportation, 202 F.3d 788 (5th Cir. 2000), in which the Fifth Circuit had upheld an agency’s § 554(e) declaratory order as adjudicatory, emphasizing “the small number of parties properly before” the agency. This contrasts sharply with the unlimited number of parties that would be directly affected by the FCC’s ruling in City of Arlington.

Moreover, both decisions ignore the fact that the declaratory order provision is part of § 554 of the APA. The language of § 554(e) itself is broad enough to authorize the issuance of a declaratory order to terminate any controversy or eliminate any uncertainty. But § 554(e) follows § 554(a), which provides: “This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing . . .” (with exceptions not relevant here). Thus, by the plain language of the APA, § 554(e) authority is available only in so-called formal adjudications. Despite that plain language, however, the Supreme Court in Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 626 (1973), said that § 554(e) “does not place administrative proceedings in [the] straitjacket” of limiting the availability of declaratory orders to “a court proceeding where there is an adjudication ‘on the record of [a] hearing.’” The Court did not explain why the limiting language of § 554(a) should be ignored or precisely how the particular circumstance could have fallen within that language. It is possible that the particular regulatory context had a significant bearing on that outcome.

Although the court in City of Arlington accepted the agency’s characterization of its action as “adjudication,” the court expressed “severe doubts” about whether the agency’s choice of adjudication could survive under the arbitrary and capricious standard of review. As a threshold matter, the court acknowledged that the declaratory provision of § 554(e) of the APA “is not limited to terminating controversies between parties.” However, emphasizing that the FCC’s action bore “all the hallmarks of products of rulemaking,” the court noted that the outcome in American Airlines had depended upon the small number of parties involved. Noting that other decisions upholding an agency’s choice of adjudication had involved minor matters, relatively small numbers of entities affected, short periods of time, or “concrete and narrow questions of law the resolutions of which would have an immediate and determinable impact on specific factual scenarios,” the court characterized the FCC’s action as “classic rulemaking.” Despite that conclusion, the court did not reach the question of whether the agency had abused its discretion in choosing adjudication because the court considered the agency’s choice harmless in light of the extent of the rulemaking-like process employed by the FCC in issuing its Declaratory Ruling.

The FCC’s reliance on its declaratory order appears to be comparable to the NLRB’s reliance on an earlier statement, in effect a declaratory order, that the Supreme Court rejected in NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). In Wyman Gordon, the NLRB had articulated a certain rule in the course of considering an adjudication, but the agency had declined to apply the rule to the parties in that case. A majority of the court (four in the plurality ultimately ruling for the agency, and two in dissent) held that the agency could not simply rely on the rule in question because the agency had not applied it to the parties at the time of the adjudicatory decision articulating the rule and had not used the notice-and-comment process to issue the rule. The agency’s earlier statement was, in effect, only a declaratory statement. Allowing an agency to issue a rule in the guise of a declaratory order would eviscerate (with a bow to Justice Scalia) the rulemaking requirements of the APA.
In another twist on the relationship between rulemaking and adjudication, the Fourth Circuit in *Almy v. Sebelius*, 2012 WL 1446029 (4th Cir. 2012), applied the longstanding *Chenery* doctrine to a dispute about approval of medical devices for Medicare coverage. The Medicare program provides three routes by which the Secretary may determine Medicare coverage for durable medical equipment. First, she may make a “national coverage determination” (NCD), essentially a nationwide rulemaking (although exempt from notice and comment). Second, a private contractor participating in the system may make a “local coverage determination” (LCD), to determine coverage on an intermediary- or carrier-wide basis (subject to review by an Administrative Law Judge). Third, contractors may make individual claim determinations based upon criteria established by the Secretary. In the absence of an applicable NCD or LCD, Medicare contractors considered the device in question on individual bases. Several denials were appealed to the Medicare Appeals Council, which determined in all cases that the device in question was not “reasonable and necessary,” thereby excluding the device from Medicare coverage.

The device manufacturer challenged the decisions on the ground that they related to the safety and effectiveness of the product, rather than the medical necessity of any individual patient. According to the manufacturer, the agency should have issued an NCD or LCD concerning the device, rather than deciding individual requests for coverage.

Not so, under “[o]ne of the earliest principles developed in American administrative law,” according to the Fourth Circuit. The choice between “proceeding by a general rule or by individual *ad hoc* litigation . . . lies primarily in the informed discretion of the administrative agency.” *SEC v. Cheney*. Since the Medicare statute did not limit the Secretary’s discretion in this regard, the court continued its practice of refusing “to constrict the ‘flexibility of the Secretary’ in implementing” the Medicare program. To hold otherwise would, as the Supreme Court said in *Chenery*, “stultify the administrative process.”

**Does D.C. Circuit Concurring Opinion Presage a Return to *Lochner***?

Beginning with the Agricultural Marketing Agreement Act of 1937, Congress has created a very complex milk-marketing scheme in which dairy farmers (producers) and processors and distributors (handlers) are governed by payment schemes designed to ensure “that all dairy farmers receive the same price for their raw milk regardless of whether they sell to high-value or low-value-handlers.” In effect, industry actors work together to ensure the price of milk. A producer may not simply offer to undercut the prices of his or her competitors.

For many years, firms operating as both producers and handlers were exempt from the pooling and pricing system, leading to complaints that ultimately led to legislation closing that loophole.

The Hettingas, dairy farmers who once fell within the loophole, challenged the new legislation as constituting a bill of attainder and violating both the Equal Protection and Due Process clauses of the Constitution. The D.C. Circuit in *Hettinga v. United States*, 2012 WL 1232592 (D.C. Cir. 2012), quickly dispensed with these arguments. First, a bill of attainder must attach to specific parties, not be open-ended as was this statute. The fact that the statute happened to apply to certain current actors did not render it a bill of attainder. Second, “statutes involving economic policy [receive] a ‘strong presumption of validity’” and will “survive if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” The court had no difficulty finding a rational basis in the “decision to close two loopholes in the AMAA scheme—that large dairy businesses have used the exemptions to gain a substantial—and ultimately disruptive—competitive advantage over their regulated competitors.”

Longstanding Supreme Court precedent forced Judge Brown to concur, but not without a strongly worded dissertation on what she called “an ugly truth”:

> America’s cowboy capitalism was long ago disarmed by a democratic process increasingly dominated by powerful groups with economic interests antithetical to competitors and consumers. And the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s.

> Complaining that the Supreme Court had “relegated economic liberty to a lower echelon of constitutional protection than personal or political liberty,” she found the rational basis test “particularly troubling in light of the pessimistic view of human nature that animated the Framing of the Constitution.” To her, history since the 1930s has shown that special interests and majoritarian greed will distort the market and intrude on economic liberty to the point that a poor child cannot buy milk from a willing grocer for a low price because the grocer is forced to sell it at a higher price. She sees references to addressing “disorderly market conduct” as a cover for redistributing wealth from consumers to those who produce milk.

> Seeing the “hope of correction at the ballot box [as] purely illusory,” Judge Brown opines that, “[r]ational basis review means property is at the mercy of the pillagers. The constitutional guarantee of liberty deserves more respect—a lot more.”

No doubt she hopes her opinion is a harbinger of things to come.

continued on next page
11th and D.C. Circuits Seemingly at Odds over Reviewability

The Florida panther may well suffer from being one of the earliest species recognized as threatened with extinction. In 1967, the Secretary of the Interior listed the Florida panther as an endangered species. At that time, the Endangered Species Act did not require the agency to designate the critical habitat for species listed as endangered. This changed in 1978, when Congress amended the ESA to require critical habitat specification at the time of listing. Those amendments also specifically provided, however, that the critical habitat requirement did not apply to species listed before 1978. For those species, Congress provided that “critical habitat may be established” by the Secretary.

In 2009, various environmental groups petitioned for a rulemaking to designate critical habitat for the Florida panther. In 2010, the agency denied the petition, stating that its existing efforts were sufficient to protect the panther. Upon the environmentalists’ challenge, the District Court dismissed on the ground that the question was “committed to agency discretion by law” under 5 U.S.C. § 701(a)(2).

In *Conservancy of Southwest Florida v United States Fish & Wildlife Service*, 2012 WL 21319857 (11th Cir. 2012), the Eleventh Circuit affirmed, rejecting arguments that statutory and regulatory requirements related to critical habitat provided sufficient guidance to support judicial review of the agency’s exercise of its discretion. The various requirements relied upon by the challengers governed the factors the agency was to consider in designating critical habitat. They did not address what the agency should do in deciding whether to designate critical habitat at all.

As a result, the Eleventh Circuit found there was no “meaningful standard” by which to review the agency’s decision, relying heavily on *Heckler v. Chaney*. The absence of any controlling standard or guidance, coupled with the discretionary language (“may”) with respect to the pre-1978 listings meant the decision could not be reviewed.

The court briefly addressed *American Horse Protection Ass’n v Lyng*, 812 F.2d 1 (D.C. Cir. 1987), in which the D.C. Circuit had accepted review of an agency’s denial of a similar petition for rulemaking, this time to protect horses. The Eleventh Circuit agreed that two factors supporting unreviewability in *Heckler* also supported unreviewability in these challenges to refusals to undertake rulemaking. First, such decisions involve a complex balancing of many factors and consideration of agency priorities, which courts are in no position to second-guess. Second, the refusal to pursue rulemaking did not “involve the exercise of ‘coercive power over an individual’s life or property rights.’”

That analysis is true as far as it goes, but the court ignored a third consideration, the one on which the D.C. Circuit relied in distinguishing the rulemaking denial from the refusal to prosecute in *Heckler v. Chaney*. The consideration supporting unreviewability in *Heckler v. Chaney* was that the FDA’s nonenforcement was comparable to the exercise of prosecutorial discretion, traditionally unreviewable. The D.C. Circuit distinguished *Heckler* on this point, noting that prosecutorial decisions are very numerous and “based on close consideration of the facts at hand, rather than on legal analysis.” By contrast, denials of rulemaking petitions are “relatively infrequent and more likely to turn on issues of law.” For these and other reasons, the D.C. Circuit held that *Heckler* had not overruled prior D.C. Circuit decisions taking review of rulemaking denials.

*Conservancy of Southwest Florida and American Horse Protection Ass’n* are in considerable tension. They are quite similar in that the relevant statutes dictated protections but did not address when or how the agency was to conduct rulemaking proceedings. Perhaps the difference lies in the fact that the horse-protection legislation specifically prohibited actions “if such use causes or can reasonably be expected to cause such horse to be sore.” A showing that soring continued to occur would demonstrate that the existing regime was in some way inadequate. The record supported that conclusion, but if an agency action is unreviewable, the record is presumably irrelevant. By contrast, the Endangered Species Act requires listing of critical habitat as the method of protecting species listed before 1978. In any case, we can expect agencies to rely on *Conservancy of Southern Florida* in future challenges to denials of petitions for rulemaking.

D.C. Circuit Holds FERC’s Overruling of Staff Arbitrary and Capricious

It is well settled that the agency head may reach a conclusion different from that recommended by the staff of the agency. But *Mobil Pipe Line Co. v. FERC*, 2012 WL 1292564 (D.C. Cir. 2012), indicates that the agency will have to explain itself very carefully if it rejects a strongly stated, well supported position taken by the agency staff.

Mobil petitioned FERC to be allowed to charge market rates on one of its oil pipelines, as opposed to the regulated rates required of pipelines with “market power.” Since it would carry only 3% of the oil produced at the origin in Western Canada, Mobil argued it did not have market power. The FERC staff agreed, referring to this decision as a “slam dunk.”

Despite staff’s advice, the Commissioners rejected Mobil’s request. The D.C. Circuit held FERC’s action arbitrary and capricious. The court’s response is striking in relying very heavily on the staff’s characterization cited above and in devoting more than half a page of its opinion to quoting staff statements that undermined the agency’s ultimate conclusion. The court also quoted rather basic economic principles back to the supposedly expert agency. 

Intervening in a Rulemaking Appeal: Who Has Standing?

By Bill Brancard

“What level of participation in an administrative rulemaking proceeding gives a participant the right to defend that new rule in an appellate court during a subsequent appeal?” So begins the opinion of the New Mexico Supreme Court in New Energy Economy Inc. v. Vanzi, 2012-NMSC-005, ¶ 1, — P.3d — (N.M. 2012). The Court was considering writs filed by a number of non-governmental organizations that had participated in rulemakings before two agencies—the Environmental Improvement Board (EIB) and the Water Quality Control Commission (WQCC)—and were now denied the right to intervene as parties in the appeals before the New Mexico Court of Appeals.

The NGOs had been strong proponents of the rules which were adopted by the EIB and the WQCC in the waning days of Governor Richardson’s administration.1 In one proceeding, an NGO (New Energy Economy) had been the party that drafted the rule and petitioned the EIB for the adoption of the rule. The rule changes were then appealed by regulated entities and industry organizations. With an election and a new Governor, EIB and WQCC membership changed and so perhaps did the boards’ support for their own rules. The NGOs moved to intervene as parties in the appeals. The Court of Appeals sent

Chair’s Message continued from page 2

As with adoption of the frequently requested records provision, it seems to me that technological developments are more than simply a but-for cause of this shift. In contrast to e-rulemaking, in this setting there is something to the “if you build it, they will come” aphorism. The past few years have seen a breathtaking increase in the accessibility of information, fueled by improvements to (I was going to say “perfection of,” but history teaches that is surely the wrong word) search engines, smart phones, wireless communications, and the like. These technological developments have in turn partly enabled, partly imposed, a fundamental shift in how Congress, agencies, and the public conceive of the very nature of “information freedom.” That shift in how we conceive of the very nature of the project has not occurred in the rulemaking setting.

It also brings with it some risks. There are no unmitigated goods. There can be too much disclosure,16 and if disclosure requirements

are driven by the available technology rather than human decisionmaking, the risk of too much disclosure is high. For example, the recent STOCK Act, billed as prohibiting “insider trading” by members of Congress, requires the Office of Government Ethics to create a searchable public database of financial disclosure reports filed by executive branch employees in the Senior Executive Service. (The reports already must be filed, but are not available on a public website). At least at first blush, that strikes me as an example of requiring Internet posting because we can; the privacy intrusion is significant and the public benefit minute or nonexistent.

Disentangling the precise causative roles of the individual, the social, and the technological is well above my pay grade. But all three are at work in almost any shift in how agencies fulfill their functions. For those shifts to be positive, human decisionmakers must simultaneously be open to the benefits new technologies provide but avoid a sort of blind infatuation in which the thrill of the technologically new displaces a thoughtful inquiry into actual benefits and drawbacks.
Section Mourns Passing of Yvette Barksdale

Yvette M. Barksdale, associate professor at The John Marshall Law School, died of natural causes at age 54 on March 14, 2012. She had been a faculty member since 1989 and taught Administrative Law, Constitutional Law, and a Law and Diversity Seminar.

Professor Barksdale was a contributing editor of the Administrative & Regulatory Law News since August 2002, penning the Recent Articles of Interest column that regularly appeared in many issues. She also served as co-chair of the Constitutional Law & Separation of Powers Committee from August 2006 to August 2010.

She was a research consultant to the Administrative Conference of the United States and a board member of the Black Women Lawyer's Association of Greater Chicago, where she received the “President’s Award for Outstanding Service” in 1993.

Professor Barksdale also served with the Chicago Scholars of Color, on committees of the Alliance of Justice, the Chicago Bar Association Alliance for Women, and the planning committee for the American Association of Law Schools Midwest Region Equal Justice Colloquium. She chaired the 2003 Annual Meeting of the Midwestern People of Color Legal Scholarship Conference.

Before teaching at John Marshall, Professor Barksdale practiced with Carter, Ledyard and Milburn in New York City and taught legal writing at University of Bridgeport School of Law and IIT/ Chicago-Kent College of Law.

She received her law degree from Yale University in 1982.

She will be greatly missed.

2012 Leadership Nominations

The Nominating Committee has submitted the following slate of candidates for election at the Annual Membership Meeting, Sunday, August 5, 2012, from 11:30 am – 12:00 pm, at the Fairmont Hotel in Chicago, IL.

Chair (by operation of the bylaws) – Jamie Conrad

Jamie is the principal of Conrad Law & Policy Counsel, a solo law practice that he established in 2007, where he provides regulatory and legislative representation of associations, companies, and coalitions in the areas of environment, homeland security, and science/information policy. He was in-house counsel at the American Chemistry Council for 14 years and previously practiced with the D.C. offices of Cleary, Gottlieb, Steen & Hamilton and Davis, Graham & Stubbs. Jamie is a frequent speaker and author. He conceived and edits the Environmental Science Deskbook (Thomson West). Jamie was a member of the council 2008-2010 and served as secretary 2005-2008. He has chaired the Legislation Committee and Environmental & Natural Resources Regulation Committee and co-chaired the Regulatory Policy Committee. Jamie has organized, moderated, and spoken at numerous Section programs. He has authored and coauthored Section reports and recommendations and blanket authority letters. Jamie also has held various leadership positions in the Section of Environment, Energy & Resources. He is a fellow of the American Bar Foundation. Jamie received a B.A. from Haverford College and a J.D. from George Washington Law School.

Chair-Elect (by operation of the bylaws) – Joe Whitley

Joe chairs the Atlanta White Collar Practice Group at Greenberg Traurig. Joe has served as program chair or co-chair of the Section’s annual Homeland Security Law Institute since its inception in 2006. The Institute has become one of the most successful Section programs under Joe’s capable leadership. Joe’s career has been marked by distinguished public service. Joe was appointed by President George W. Bush as the first General Counsel of the United States Department of Homeland Security (DHS) in 2003. He held that position for two years, working for Secretary Tom Ridge and Secretary Michael Chertoff, before returning to private practice. Before that, in the George H.W. Bush Administration, he served as the Acting Associate Attorney General, the third-ranking position in the Department of Justice. He was appointed by Presidents Reagan and Bush, respectively, to serve as the United States Attorney in the Middle (Macon) and Northern (Atlanta)

Former Chair Rusch Receives Award

Former Section Chair Jonathan Rusch has received the Director General’s Commendation from the United Kingdom Serious Organised Crime Agency (SOCA). This award, which is rarely given to non-Britons, is the highest award that SOCA can bestow.
Anna received her undergraduate degree from Central State University, her Master of Science from the University of Nebraska, and her J.D. from the University of Minnesota. She served as Secretary of the Section from 2006-2009, was a long-time Chair of both the Publications Committee and the Immigration Committee, was the Section’s Liaison to the ABA Commission on Immigration, and served as a Council Member. In the larger ABA, Anna has served as a member of the ABA Commission on Law and Aging and a member of the ABA Coordinating Committee on Immigration Law. Anna received her undergraduate degree from Central State University, her Master of Science from the University of Nebraska, and her J.D. from the University of Minnesota.

Vice Chair – Anna Shavers

Anna is the Cline Williams Professor of Citizenship Law at the University of Nebraska Law School, where she teaches, among other things, administrative law and immigration law, and where she founded the school’s immigration clinic. She served as Secretary of the Section from 2006–2009, was a long-time Chair of both the Publications Committee and the Immigration Committee, was the Section’s Liaison to the ABA Commission on Immigration, and served as a Council Member. In the larger ABA, Anna has served as a member of the ABA Commission on Law and Aging and a member of the ABA Coordinating Committee on Immigration Law. Anna received her undergraduate degree from Central State University, her Master of Science from the University of Nebraska, and her J.D. from the University of Minnesota.

Last Retiring Chair (by operation of the bylaws) – Michael Herz

Michael is Professor of Law and Co-Director of the Floersheimer Center for Constitutional Democracy at the Benjamin N. Cardozo School of Law, Yeshiva University. He has taught at Cardozo since 1988 and has also been a visiting professor at the NYU Law School and Princeton’s Woodrow Wilson School and an adjunct professor at Columbia. He teaches and writes primarily in the areas of administrative law, environmental law, and constitutional law, and recently became co-editor of the Breyer-Stewart administrative law casebook. Before entering academe, Michael was an attorney at the Environmental Defense Fund and a law clerk for Justice Byron White of the U.S. Supreme Court and Chief Judge Levin Campbell of the U.S. Court of Appeals for the First Circuit. He is a graduate of Swarthmore College and the University of Chicago Law School.

Secretary – Renée Landers (Incumbent)

Renée is Professor of Law at Suffolk University Law School and teaches administrative law, constitutional law, and health law. She also is the Faculty Director of the school’s Health and Biomedical Law Concentration. Renée was president of the Boston Bar Association in 2003–2004, the first woman of color and the first law professor to serve in that position. She has worked in private practice and served as Deputy General Counsel for the U.S. Department of Health and Human Services and as Deputy Assistant Attorney General in the Office of Policy Development at the U.S. Department of Justice during the Clinton Administration. Renée recently completed a term as a member of the Massachusetts Commission on Judicial Conduct, serving as vice chair from April 2009 until October 2010. She was a member of the Supreme Judicial Court’s committees studying gender bias and racial and ethnic bias in the courts. She is a graduate of Radcliffe College and has served as President of the Harvard Board of Overseers. Renée has held the following Section leadership positions: council member, 2000–2003, Nominating Committee member, 2003–2004; Membership Committee chair 2004–2006; co-vice chair, Health and Human Services Committee 1998–2000.

Budget Officer – Ron Smith (Incumbent)

Ron is Pro Bono Counsel with Finnegan, Henderson, Farabow, Garrett & Dunner, LLP. He manages Finnegan’s veteran’s pro bono program of more than 100 pending appeals in federal courts. Prior to joining Finnegan in the summer of 2008, he was Deputy General Counsel for Veterans Claims for the Disabled American Veterans, where he supervised all appeals to the federal courts for the DAV. Prior to joining the DAV in February 1989, Ron worked in the Department of Veterans Affairs Office of Inspector General. He has authored a number of articles on veteran’s law topics and has prosecuted more than 400 appeals in the federal courts, resulting in more than sixty published opinions. Ron has served on the Court of Appeals for Veterans Claims Rules Advisory Committee for many years and is a past chair of that committee. He has also been appointed to and presently serves on the Federal Circuit Advisory Council. Ron is a past President of the Federal Circuit Bar Association and a past chair of the Federal Bar Association Veterans’ Law Section. He presently serves in the ABA House of Delegates on behalf of the Federal Circuit Bar Association and was the Section’s Assistant Budget Officer for 2008–2009. He is a founding member of the Court of Appeals for Veterans Claims Bar Association.

Asst. Budget Officer – Edward Schoenbaum

Ed is an Administrative Law Judge for the Illinois Department of Employment Security. He is currently the ex officio Council Member on behalf of State Administrative Law and is a long-time co-chair of the State Administrative Law Committee. Ed is also a past President of the National Association of Administrative Law Judges and past Chair of the ABA’s National Conference of Administrative Law Judges (NCALJ). He is currently the Chair-Elect of the Senior

continued on next page
Lawyers Division. For six years he was the Budget Officer for the Judicial Division, and he served as NCALJ’s representative to the House of Delegates.

Section Delegate – H. Russell Frisby, Jr.

Russell is a Section Fellow, a former Section Chair, a former Chair of the Nominations Committee, a Member of the ABA’s Standing Committee on Governmental Affairs, a Life Fellow of the American Bar Foundation, and a Public Member of the Administrative Conference of the United States. A partner at the firm of Stinson Morrison Hecker, LLP, Russell’s past accomplishments are too numerous to list, but among them is his service as chair of the Maryland Public Service Commission. Russell is a graduate of Swarthmore College and Yale Law School.

Council Member (to fill two year term) – Jill Family

Jill is currently serving on the Council, filling a one-year term vacancy. Jill is an associate professor of law and associate director of the Law & Government Institute at Widener University School of Law, where she teaches immigration law, administrative law, and civil procedure. She is a past chair of the Section’s Immigration and Naturalization Committee, the 2010 fellow of the National Administrative Law Judiciary Foundation, a fellow of the American Bar Foundation, and a former law clerk to the Honorable Morton I. Greenberg of the United States Court of Appeals for the Third Circuit. Jill received her BA from the University of Pennsylvania and her M.S. and J.D. from Rutgers.

Council Member – Jeffrey Clark

Jeff is a partner at Kirkland & Ellis, where he is a complex trial and appellate litigator with especially deep experience in administrative law, cutting across dozens of statutes and numerous agencies. From 2001 to 2005, Jeff was a Deputy Assistant Attorney General for the Environment and Natural Resources Division of the Justice Department. Jeff is co-chair of the Section’s Environmental and Natural Resources Regulation Committee and has been a frequent speaker at Section programs. Jeff did his undergraduate work at Harvard, obtained a M.A. at the University of Delaware, and received his J.D. from Georgetown, where he was Articles Editor for the law review.

Council Member – Louis George

Louis is a senior attorney with the National Veterans Legal Services Program (NVLSP). As a member of NVLSP’s litigation staff, he represents veterans and dependents before the Department of Veterans Affairs, the Board of Veterans’ Appeals, the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, and other federal courts. Louis serves on the Board of Governors of the Court of Appeals for Veterans Claims Bar Association, having served as President of that organization from 2009-2010. He is a member of the Rules Advisory Committee of the U.S. Court of Appeals for Veterans Claims. He also is Co-chair of the Section’s Veterans Affairs Committee.

Council Member – Elizabeth Getman

Elizabeth is an associate with Sandler, Reiff, Young & Lamb, P.C., where she advises federal, state, and local political committees and candidates; state and national political parties; section 527 organizations; lobbying firms; nonprofit organizations; and other for-profit business entities. Elizabeth has served as both General Counsel and Deputy General Counsel to the campaigns of high-profile candidates running for statewide elective office, most recently in Connecticut and Virginia. She co-chaired the Section’s 2010 Administrative Law Conference and has served as co-chair of both the Continuing Legal Education Committee and the Elections Committee. Elizabeth completed her undergraduate education at Washington University in St. Louis and earned her J.D. at Catholic University.

Council Member – Kathryn Watts

Kathryn is the Garvey Schubert Barer Professor of Law and Associate Dean for Research & Faculty Development at the University of Washington, where she teaches administrative law, constitutional law, and Supreme Court decision making. A prolific scholar, Kathryn has had administrative law articles published in the Yale Law Journal, the Harvard Law Review, the Northwestern University Law Review, and the U.C. Davis Law Review. She has a forthcoming publication in the Duke Law Journal. As a law student, she co-authored an article with Professor Thomas Merrill that won the Section’s Award for Distinguished Scholarship. She is co-chair of the Judicial Review Committee and has been a regular speaker at the Section’s Administrative Law Conference.

IS YOUR LIBRARY COMPLETE? Check the list of Administrative Law publications at www.ababooks.org to be sure.
Rulemaking  
Chair: Jeffrey Rosen  
State Administrative Law  
Co-Chairs: Errol H. Powell, Edward J. Schoenbaum

**GOVERNMENT FUNCTIONS COMMITTEES**

**Agriculture**  
Chair: Ryan K. Mihner  
Antitrust and Trade Regulation  
Co-Chairs: Chong S. Park, Lore A. Unt  
Banking and Financial Services  
Co-Chairs: John F. Cooney, Christine C. Franklin  
Benefits  
Co-Chairs: Jodi B. Levine, Rudolph N. Patterson  
Beverage Alcohol Practice  
Co-Chairs: Tracy Genesen, Charles Smart  
Communications  
Co-Chairs: Scott D. Delacourt, Donna C. Gregg  
Consumer Products Regulation  
Co-Chairs: David H. Baker, Peter Lee Winak  
Criminal Process  
Chair: Nancy Eyl  
Education  
Chair: Caroline Newcomb  
Elections  
Co-Chairs: Elizabeth Leigh Howard, Brandis Lee Ann Zehr  
Energy  
Chair: Kenneth G. Hurwitz  
Environmental and Natural Resources Regulation  
Co-Chairs: Jeffrey B. Clark, Michael S. Gill  
Ethics and Professional Responsibility  
Chair: Myles E. Eastwood  
Federal Clean Energy Finance  
Chair: Warren Belmar  
Food and Drug  
Co-Chairs: James T. O’Reilly, Katherine Van Tassel  
Government Personnel  
Co-Chairs: Joel P. Bennett, Andrew Perlmuter  
Health and Human Services  
Chair: Timothy Aspinwall  
Homeland Security and National Defense  
Co-Chairs: Chad Boudreaux, Elizabeth Branch, Joe D. Whitley  
Housing and Urban Development  
Chair: Otto J. Hetzel  
Immigration & Naturalization  
Co-Chairs: Rachel Rosenblom, Kate Kalynsky  
Insurance  
Co-Chairs: Janet E. Belkin, Samuel D. Childers  
Intellectual Property  
Co-Chairs: John Fitzgerald Duffy, Arti K. Rai  
International Law  
Chair: David Zaring  
International Trade & Customs  
Chair: Leslie Alan Glick  
Labor and Employment  
Co-Chairs: Marc A. Antonetti, Robert J. Hickey  
Ombuds  
Co-Chairs: Nina Olson, Karen Finnegan  
Securities, Commodities and Exchanges  
Co-Chairs: Lisa A. Mondschein, Fiona A. Philip  
Transportation  
Chair: Jason Schlossberg  
Veterans Affairs  
Chair: Louis J. George

**SECTION ACTIVITIES COMMITTEES**  
Annual Awards  
Committee on Outstanding Government Service  
Co-Chairs: Paul G. Afonso, Roberta Karmel, Elaine S. Reiss  
Committee on Scholarship  
Chair: Jonathan J. Rusch  
Budget  
Chair: Ronald Smith  
Fellows  
Chair: John Hardin-Young  
Funding  
Chair: Joe D. Whitley  
Membership and Communications  
Chair: Jonathan J. Rusch  
Nominations  
Chair: William Funk  
Pro Bono  
Co-Chairs: Jodi B. Levine, Edward J. Schoenbaum  
Publications  
Chair: William S. Jordan III  
Administrative and Regulatory Law News  
Editor-in-Chief: William S. Morrow, Jr.  
Administrative Law Review  
Editor: Jeffrey S. Lubbers  
Ad-Hoc Committees  
Federal Preemption  
Chair: William Funk  
Homeland Security Coordinating Committee  
Chair: Joe D. Whitley  
Review of Recruitment of ALJ’s by OPM  
Chair: John T. Miller
From the ABA Section of Administrative Law and Regulatory Practice


Edited by Jeffrey B. Litwak

Now in its second edition, this guide is written to assist government and private counsel engaged in all varieties of administrative adjudication. The book is an outgrowth of an Administrative Procedure Act (APA) study that was launched by the ABA Section of Administrative Law and Regulatory Practice prior to the first edition.

Comprehensive in scope, this book includes information and discussion on such topics as:
- Adjudication under the APA
- Hearings required by procedural due process
- The right to a hearing under the APA
- Pre-hearing requirements
- Hearing requirements
- Post-hearing requirements
- Integrity of the decision-making process
- Alternative dispute resolution
- Informal adjudication
- Administrative law judges
- Attorneys’ fees under the Equal Access to Justice Act
- Adjudication under the Model State Administrative Procedure Act

Whether you are a private or government lawyer who engages in adjudication before federal agencies, or an administrative law judge deciding federal adjudication cases, this valuable reference is a must for your book shelf!

To order, visit www.ShopABA.org or call the ABA Service Center at 1.800.285.2221.