The Judicial Review

An Analysis of Recent Decisions Affecting Public Servants

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This section of *Policy Perspectives* reports on cases which have had an influence on public servants during the past year. The following cases were either argued before the Supreme Court or are Court of Appeals cases to which the Supreme Court has recently granted certiorari. The cases were selected on the basis of their relevance to public administration and their effect on the ability of government entities and public servants to carry out official duties.

Eleventh Amendment Immunity

In *Hess v. Port Auth. Trans-Hudson Corp.*,[1] the Supreme Court addressed the issue of whether a bistate entity qualified for Eleventh Amendment immunity.[2] The Court refused to grant the respondent immunity from suit in federal court by the entity's employees under the Federal Employers' Liability Act (FELA).[3] By not allowing the railway to be shielded, the Court made a clear distinction between such entities and states themselves which continue to have substantial immunity. The importance of the *Hess* decision lies in the Court's explanation outlining the criteria for Eleventh Amendment immunity.

The Port Authority Trans-Hudson Corporation (PATH) is a wholly owned subsidiary of the Port Authority of New York and New Jersey and was created pursuant to the Constitution's Interstate Compact Clause.[4] The petitioners, who were injured in unrelated incidents while employed as railroad workers for PATH, filed separate personal injury actions under FELA. In dismissing the suits, the District Court stated that PATH, as a state agency, was entitled to Eleventh Amendment immunity from suit in federal court. The Third Circuit affirmed.

In reversing the lower court's decision, the Supreme Court focused on the impetus for the Eleventh Amendment's adoption. In protecting states from suit in federal court without their consent,[5] the Eleventh Amendment emphasizes the integrity retained by the states and respects the states' right to sovereign immunity. However, according to the Court, bistate entities such as PATH do not have the same position in the federal system as do the states themselves.[6] Refusing to give PATH immunity would not undermine the Eleventh Amendment's goals of maintaining the states' dignity and protecting the states' financial solvency. "Requiring the Port Authority to answer in federal court to injured railroad workers who assert a federal statutory right, under the FELA, to recover damages does not touch the concerns—the States' solvency and dignity—that underpin the Eleventh Amendment."[7]

According to the Court, the dignity of New York and New Jersey is not threatened by allowing the petitioners to go ahead with a FELA claim, for PATH is a discrete bistate entity created by a compact among three sovereigns (the two states and the federal government). The mission of such an entity is to deal with situations that are not easily confined within national boundaries or state lines. Moreover, the states' integrity is not threatened when PATH is refused immunity because the states, when creating an entity under the Compact Clause, "agreed to the power sharing, coordination, and unified action that typify Compact Clause creations."[8]

After concluding that the dignity of New York and New Jersey would not be threatened by the proposed lawsuit, the Court reasoned that the states would not be harmed financially by allowing the petitioners to pursue their FELA claims against PATH in federal court. PATH is financially independent and self-sustaining and New York and New Jersey would not be responsible for paying the cost of any damages assessed against the defendant in the lawsuit; thus, the important Eleventh Amendment goal of protecting state treasuries would not be implicated. As the Court

wrote, protecting the states' purses from money judgments is "the most salient factor in Eleventh Amendment determinations".[9]

Therefore, as a discrete, financially self-sufficient entity, PATH can be required to appear in federal court and defend against a FELA suit brought by injured employees. However, the Court was very careful to distinguish between such a bistate entity and the states themselves, which continue to enjoy shelter from suits in federal court.

Justice O'Connor, joined by Justices Rehnquist, Scalia, and Thomas, dissented, believing that the Eleventh Amendment gave PATH immunity from suit in federal courts. Justice O'Connor wrote that two states acting together should be as deserving of immunity as when either State acts alone.[10] Moreover, the Eleventh Amendment "bars federal jurisdiction over 'any suit in law *or equity*' against the States."[11] Thus, the decision to provide immunity should not turn on whether the state treasury is implicated. According to Justice O'Connor, the focus should be on whether the state possesses sufficient control over the bistate entity so that the entity is an extension of the State itself. Such control can exist even when the State assumes no liability for the entity's debts. Looking at the distinct facts of the instant case, Justice O'Connor found sufficient control by New York and New Jersey over PATH and thus reasoned that the Eleventh Amendment should shield PATH from suits in federal court.

In a related development, the Supreme Court granted certiorari in a Fourth Circuit case involving Eleventh Amendment immunity, vacated the judgment, and directed the Court of Appeals to consider the case in light of *Hess*. In *Ristow v. South Carolina Ports Auth.*,[12] the Fourth Circuit held that the defendant ports authority was entitled to immunity from a personal injury suit brought by a truck driver who was injured at the ports authority's terminal.

The Ports Authority had claimed immunity as a state entity. To determine whether an entity is an arm of the state entitled to immunity, the Fourth Circuit employed a four-part test:

(1)whether the state treasury will be responsible for paying any judgment that might be awarded; (2)whether the entity exercises a significant degree of autonomy from the state; (3)whether it is involved with local versus state-wide concerns; and (4)how the entity is treated as a matter of state law...[13]

Like the Supreme Court, the Fourth Circuit viewed the protection of the state treasury as being the "most salient" factor in reviewing a claim of immunity. "The first...factor, the responsibility of the state treasury for the judgment, is generally the most important."[14] However, whereas the Supreme Court, in *Hess*, found the financially independent and self-sustaining nature of the bistate entity prevented the state treasury from paying any judgment against the entity, the Fourth Circuit found self-sufficiency inadequate to shield the state treasury from paying a judgment against the ports authority.

Although the South Carolina State Ports Authority now appears to be self-sufficient, it was created through the use of state funds and received annual appropriations from the General Assembly throughout the early years of its existence. Its control over its revenues and borrowing power are substantially circumscribed.[15]

The Fourth Circuit originally found that the Ports Authority was ultimately answerable to the state and had functions which affect all regions of the state; no countervailing evidence existed to show the Ports Authority was not to be considered a state entity. "We conclude that the South Carolina State Ports Authority is the alter ego of the State of South Carolina and is therefore entitled to Eleventh Amendment immunity from suit."[16]

The Fourth Circuit's re-examination of this case in light of the *Hess* decision should prove to be an interesting lesson in how the lower courts will be guided by the Supreme Court's explanation outlining the criteria for Eleventh Amendment immunity.

Judicial Review and Burden of Proof Under the APA

The Supreme Court addressed whether Presidential actions as well as agency actions, when only advisory in nature, are subject to review under the Administrative Procedure Act ("APA").[17] In *Dalton v. Specter*,[18] members of Congress, state officials, shipyard employees, and the employees' unions sought to enjoin the Secretary of Defense and the Defense Base Closure and Realignment Commission from carrying out the President's decision to close the Philadelphia Naval Shipyard pursuant to the Defense Base Closure and Realignment Act of 1990 ("1990 Act") which established a complicated process for selecting bases to be closed. [19] The action, filed under the APA, alleged that the procedural requirements of the 1990 Act were violated by the Secretary and the Commission and sought judicial review. The Court held that the alleged procedural flaws committed during the selection process which led to

President Bush's decision to close the military base were not judicially reviewable.

The APA provides for judicial review only of "final agency action."[20] In this instance, the Supreme Court, in an opinion written by Justice Rehnquist for a five-justice majority, held that the prerequisite for review under the APA was lacking. The Secretary's and Commission's reports containing recommendations for base closures and realignments were not final and binding determinations but merely "tentative" suggestions. "The reports are, 'like the ruling of a subordinate official, not final and therefore not subject to review.'"[21] These reports did not directly bring about any base closings and, therefore, will not directly affect the parties. Only action taken by the President—his certification of approval of the recommendations—will bring about the base closings.

In a further twist, the Court stated that the President's actions are not reviewable under the APA because the President is not an "agency" within the meaning of the APA. The President is not explicitly excluded from the APA's definition of "agency" but he is neither explicitly included. The Court had previously concluded that "textual silence" is not sufficient to subject the President's actions to review under the APA.[22]

The respondents argued that the Commission's report should be regarded as final, and therefore reviewable, because the President had little authority regarding the base closures. He could not revise or amend the list of recommended closures but was only permitted to accept or reject the closure package in its entirety. The Court rejected this argument by determining when the report would be considered final and what action would bring about closure of the military installations. Under the APA, finality is determined by establishing whether an agency has completed the decision-making process and whether that process will directly affect the parties.[23] Here, the President takes the final action which will affect the bases. Without the President's approval, no bases are closed. Thus, the decisions made pursuant to the 1990 Act were not reviewable under the APA.[24] In concurring, Justice Souter, joined by Justices Blackmun, Stevens, and Ginsberg, stated that the 1990 Act itself precluded judicial review. While there is no precise language which refutes judicial review, Justice Souter wrote that Congress would not have enacted the 1990 Act with such strict timetables for action on the part of the Secretary, Commission, and President if litigation was contemplated.

The Supreme Court addressed a second issue involving the APA in *Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries.*[25] In adjudicating separate benefits claims under two federal workers' compensation acts, the Department of Labor's Administrative Law Judges applied the Department's "true doubt" rule which shifted the burden of persuasion to the party opposing the benefits claim and under which a benefits claimant wins where the evidence is evenly balanced. However, the Court held that the true doubt rule was invalid as violating Section 7(c) of the APA which states that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."[26] The true doubt rule inappropriately switched the burden of persuasion away from the party seeking the award to the party opposing the benefit. Also, under the rule, when the evidence is evenly balanced, the benefits claimant wins whereas under Section 7(c), the benefits claimant must lose.

The Department contended that the "burden of proof" only imposes the burden of production or the burden of coming forward with evidence to support a claim. While the APA does not define "burden of proof," Justice O'Connor held that a consensus on the meaning of the phrase emerged during the early 20th century and the generally accepted meaning at the time of APA's enactment was "burden of persuasion." Therefore, the Court reasoned that the "ordinary or natural" meaning of burden of proof is the burden of persuasion or the obligation to persuade the trier of fact of the truth of a proposition.[27] Thus, the Department violated Section 7(c)'s requirement that the burden of persuasion rests with the party seeking the award.

Furthermore, the Court addressed the critical issue of uniformity. If the Department's true doubt rule was upheld, all agencies would be given free reign in deciding who shall carry the burden of persuasion. However, the APA was designed to "introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies..."[28] Thus, the true doubt rule, in conflict with the APA's goal, was held invalid.

Public Employees' Freedom of Speech

In *Waters v. Churchill,*[29] the Supreme Court failed to give a definitive answer to the question of how a trial court should determine the facts when deciding whether a government employee's speech is protected by the First Amendment. The Court had earlier held in *Connick v. Myers*[30] that to be protected, a government employee's speech must be on a matter of public concern and any

injury suffered by the state as employer (such as a diminished ability to promote public services) must not outweigh the employee's constitutionally protected interest in self-expression.

In this case, the respondent, Churchill, was fired from her position as a nurse in a public hospital. Churchill claimed that the firing was due to her criticism of certain hospital policies which allegedly threatened patient care. The petitioners contended that Churchill made disruptive and critical comments about the obstetrics department and the department's supervisor. Although unable to agree on an opinion, seven members of the Court ruled that the case should be remanded for a determination as to the actual motivation behind the firing.

The Court's inquiry centered on whether the *Connick* test should be applied to the speech as the government employer described it to be or whether the court should ask the jury to decide the facts for ituself. The Court did not put forward a general test for determining when a procedural safeguard is required by the First Amendment. Instead, the Court stated that the procedural requirements which need to be followed in order to satisfy the First Amendment are to be decided on a "case-by-case basis...on the cost of the procedure and the relative magnitude and constitutional significance of the risks it would decrease and increase."[31]

A four-justice plurality held that in this case based on a government employee's speech, the petitioner hospital and its officials would win if the petitioners truly believed the speech was potentially disruptive to workplace harmony. "[T]he government as employer indeed has far broader powers than does the government as sovereign...[and] most observers would agree that the government must be able to restrict its employees' speech."[32] Thus, the Court gave substantial weight to the idea that a government employer may restrict speech that is reasonably likely to cause disruption, even if the speech in question is on a matter of public concern. The government's burden is to show that the speech threatened to interfere with government operations. In holding that the government as employer has some power to restrict speech, the Court relied on the government's mission and the purpose of hiring employees. "Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible."[33] If an employee is hindering rather than aiding in the accomplishment of these tasks, the government employer must have the ability to appropriately deal with the employee.

The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.[34]

However, a material issue of fact remained in this case about the impetus for the employee's dismissal. The fired employee produced enough evidence to suggest that a reasonable fact finder could conclude that the firing was due to statements that were not disruptive but were on matters of public concern. Therefore, the lower court's judgment was vacated and the case remanded for a determination on whether the employee was fired for making statements that were protected speech.

In concurring, Justice Souter stated that a public employer who reasonably believes, after making a thorough investigation, that an employee has made disruptive remarks may punish the employee even if it turns out that the employee's remarks were constitutionally protected. "[T]he public employer must not only reasonably investigate the third-party report, but must also believe it."[35] Justice Scalia wrote that firing an employee for making disruptive remarks would violate the First Amendment only if the discipline was in retaliation for the employee's speech on a matter of public concern. Employers should not be forced to carry out the added procedural requirement of conducting an investigation before taking disciplinary action. Public employees are protected against wrongful termination based on retaliation but are not protected when termination is based on mistake.

Justice Stevens, in dissent, expressed the view that public employment free speech cases should be determined not on what the government employer reasonably thought was said, but rather on what the trier of fact ultimately determines to have been said. A First Amendment violation should not be ignored simply because the employer engaged in a reasonable inquiry of an employee's conduct or had pure motives. The First Amendment does not state that ignorance or mistake shall be a complete defense for a firing based on fully protected speech. The "controlling question. . . [is] whether the employer's freedom of speech has been abridged"[36] Allowing for a dismissal based on speech so long as the employer reasonably believed the

speech to be unprotected "provides less protection for a fundamental constitutional right than the law ordinarily provides..."[37]

In light of *Waters*, the Supreme Court granted certiorari in a case involving a well-known, if not infamous, speech by an African-American professor. In *Jeffries v. Harleston*,[38] which was decided only a month prior to *Waters*, the Second Circuit held that the City University of New York ("CUNY") violated Professor Leonard Jeffries' free speech rights by removing him as chair of the Black Studies department. The removal came as a result of a controversial off-campus speech criticizing the state's public school curriculum, during which Professor Jeffries made several caustic remarks about Jews. The Supreme Court vacated the decision and remanded the case to the Second Circuit for reconsideration in accordance with *Waters*.

In deciding whether CUNY violated Professor Jeffries' free speech rights, the Second Circuit originally engaged in a balancing test concerning the efficiency of government operations. "[T]he employee's interest in speaking on matters of public concern must be balanced against the government's interest in rendering public services efficiently."[39] Professor Jeffries was able to establish a *prima facie* case that his free speech rights were violated by demonstrating that the controversial speech involved a matter of public concern and was a motivating factor in the University's decision to remove him as department chairman.

According to the court's original decision, the defendants could have escaped liability if they had been able to show that Jeffries would have been fired anyway or that the speech actually disrupted the work of the University. However, the court ruled the facts showed the defendants would not have removed Jeffries but for the speech and the speech did not disrupt CUNY's operations.[40] Moreover, when speech by an employee, such as Jeffries, involves public matters, the Second Circuit initially held that the government must show that the speech interfered with the "effective" and "efficient" operation of the government services[41] and the defendants were unable to "shoulder the weightier burden of showing that the speech caused substantial disruption of CUNY."[42]

However, to be consistent with *Waters*, the Second Circuit reversed itself.[43] The Second Circuit's original decision was based on the then-applicable rule that the government could not discipline an employee for speaking on matters of public concern, unless the government could show that the speech "actually" harmed government operations. "At the time, the strict actual interference requirement reflected the law of the Second Circuit".[44] After *Waters*, the court reasoned that the current rule is that the government could fire an employee based on "a reasonable prediction" that the speech is likely to be disruptive. According to the court, Jeffries did not suffer a violation of his First Amendment rights because the decision to discipline Jeffries resulted from the reasonable expectation that his speech would harm CUNY by disrupting university operations.

By stressing that actual disruption is not required, Waters pulls a crucial support column out from under the earlier *Jeffries* opinion. "We are now constrained to hold under *Waters* that the defendants did not violate Jeffries' free speech rights if : (1) it was reasonable for them to believe that the...speech would disrupt CUNY operations; (2) the potential interference with CUNY operations outweighed the First Amendment value of the...speech; and (3) they demoted Jeffries because they feared the ramifications for CUNY..."[45]

It will be interesting to see how this case affects public employees who wish to speak out on issues that may be contrary to the views of their government employers.

Last year in this section, *Policy Perspectives* reported on a case from the U.S. Court of Appeals for the District of Columbia which is of great significance to Executive Branch employees of the U.S. government who wish to receive honoraria. In *National Treasury Employees Union v. U.S.*,[46] the Court of Appeals held that Section 501(b) of the Ethics in Government Act of 1978[47] was unconstitutional as overly broad. Section 501(b) prohibits Members of Congress, federal officers, or other Government employees from accepting an honorarium for making an appearance, giving a speech, or writing an article. The Court of Appeals emphasized that the statute provided no "nexus" between the Government employment and individual speeches and articles. In fashioning a remedy, the court rewrote Section 501(b) to exclude Executive Branch employees from the statute's application. The Clinton Administration, concerned that Executive Branch employees not be seen as misusing or as appearing to be misusing their positions by accepting compensation for unofficial and nonpolitical activities, asked the Supreme Court to review the lower court's decision and reinstate the federal ethics law banning payments for appearances, speeches, or articles by Executive Branch employees.

However, the Supreme Court held that Section 501(b) did indeed violate the First Amendment as to all government employees[48] because the statutory prohibition on accepting

any compensation for making speeches or writing articles applied even when the subject matter of the speech or article or the individual or group paying the employee had no connection to the employee's official government work.

Referring to previous public employee speech cases, including *Waters v. Churchill, supra,* Justice Stevens reiterated the Court's holding that the speech of public employees may be subject to restraints that would be unconstitutional if applied to the public at large. However, the "expressive activities in this case fall within the protected category of citizen comment on matters of public concern rather than employee comment on matters related to personal status in the workplace."[49] Unlike previous cases, this situation does not involve *post hoc* analysis of an employee's speech but instead acts as an unconstitutional "chill" on potential speech, for the statute's "prohibition on compensation unquestionably imposes a significant burden on expressive activity."[50]

Citing *Waters*, the Court concluded that Section 501(b) could not be justified on the grounds that the statute's prohibition would avoid workplace disruption. "[T]he vast majority of the speech at issue in this case does not involve the subject matter of government employment and takes place outside the workplace..."[51] Moreover, the Government referred to no evidence of misconduct related to honoraria by federal employees below grade GS-16 but relied on impropriety by legislators and high-level executives. "Congress could not...reasonably extend that assumption of [misconduct] to all federal employees below Grade GS-16, an immense class of workers with negligible power to confer favors on those who might pay to hear them speak or to read their articles."[52] In addition, the Court did not view the statute as a "reasonable response" to insure operational efficiency of the federal service, for Section 501(b) would allow honoraria to be accepted for a "series" of articles or speeches as long as there was no nexus between, or identification of, the payor and the government employment. Yet, "[f]or an *individual* article or speech, in contrast, pay is taboo even if neither the subject matter nor the payor bears any relationship at all to the author's duties."[53]

Justice O'Connor concurred in the Court's holding that the statute, by barring the respondents from receiving honoraria for activities that bear no nexus to government employment, was an infringement on free speech .[54] However, Justice O'Connor dissented with regard to the Court's ability to provide an appropriate nexus principle and stated that the statute should have been held invalid only to the extent that the statute banned honoraria for activities that had no nexus to the work of Executive Branch employees.[55]

In an angry dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote that the Court's opinion was "seriously flawed"[56] and the statute was constitutional because compensation was denied, not freedom of expression. According to the dissenters, the statute is a reasonable means to meet the Government interest of preventing impropriety and the appearance of impropriety and the ban is a content-neutral restriction. In describing the Court's opinion on the remedy as an "O. Henry ending," Justice Rehnquist agreed with Justice O'Connor that a nexus requirement could be established so that activities that met this test would still be banned.[57]

Personal Privacy and the Freedom of Information Act

The Court analyzed the Freedom of Information Act ("FOIA")[58] and the unwarranted invasion of public employees' personal privacy in *U.S. Dep't of Defense v. Federal Labor Relations Auth.*[59] Congress enacted the original FOIA in 1966 as an amendment to the Administrative Procedures Act. The FOIA reflects "a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language."[60] The statute has been praised as a check on government and as an opportunity for the public to look into federal government processes.

In this case, the Federal Labor Relations Authority had directed federal agencies to provide certain unions with the home addresses of agency employees represented by the unions. The agencies had refused to supply the unions with the employees' home addresses, arguing that disclosure of such information violated the Privacy Act of 1974.[61] The lower court granted enforcement, stating that the Privacy Act does not bar disclosure of personal information if the disclosure would be required under FOIA.[62] In ruling that such information was required to be released pursuant to FOIA, the lower court opined that FOIA's Exemption number 6 from disclosure of personnel files "which would constitute a clearly unwarranted invasion of personal privacy"[63] did not apply since the public interest in collective bargaining outweighed the public employees' interest in keeping home addresses private.[64] In reversing, the Supreme Court, through Justice Thomas, stated that such a disclosure would constitute a clearly unwarranted invasion of privacy within the meaning of Exemption number 6.

In evaluating whether certain requests for information lie within the scope of a FOIA exemption, precedent dictates that the interest in privacy must be balanced against the public interest in disclosure. Furthermore, the Supreme Court maintained a restrictive definition of the "public interest in disclosure" by stating that the public interest to be weighed is the extent to which public understanding of the activities of the government would be benefitted through disclosure.

In the instant case, the Supreme Court held the relevant public interest in disclosure to be negligible, for such disclosure would "reveal little or nothing about the employing agencies or their activities."[65] Disclosure may allow the unions to have better communications with employees, "but it would not appreciably further 'the citizens' right to be informed about what their government is up to.'"[66] Since the FOIA-related public interest in disclosure was virtually nonexistent, the Court concluded that the employees' interest in nondisclosure needed only to be determined as "not insubstantial" and that Exemption number 6 includes "the individual's control of information concerning his or her person."[67] The privacy of the employees' homes is "accorded special consideration in our Constitution, laws, and traditions."[68] Thus, the privacy interest of the employees outweighed public interest in disclosure and, therefore, such disclosure would constitute a clearly unwarranted invasion of personal privacy. Since FOIA did not require the agencies to divulge the addresses, the Privacy Act, therefore, prohibited release of the addresses.

Refusal to Extend *Bivens* to Federal Agencies

The most interesting and pertinent issue that arose in *FDIC v. Meyer*[69] concerned the extension of a *Bivens* cause of action directly against a federal agency. In *FDIC v. Meyer*, the Federal Savings and Loan Insurance Corporation ("FSLIC"),[70] as receiver of a failed savings and loan association, through its special representative, discharged the respondent Meyer, a senior association officer. Meyer sued one year later, claiming that the discharge deprived him of a property right (continued employment) without due process of law in violation of the Fifth Amendment. The Supreme Court agreed with the Ninth Circuit that Meyer was entitled to maintain an action against the agency because, among other things, Meyer's claim was not subject to the jurisdiction of the Federal Tort Claims Act, which normally would have controlled the proceeding. Additionally, a clause in the enabling legislation of FSLIC removed FSLIC's defense of sovereign immunity from this case; normally, such a defense would have created an absolute barrier to Meyer's lawsuit.

However, the Supreme Court, in an unanimous decision, disagreed with the Ninth Circuit's conclusion that the respondent had a cause of action for damages against the agency because sovereign immunity had been waived. In making his claim that his due process rights had been violated, Meyer relied upon *Bivens v. Six Unknown Named Agents*.[71] The *Bivens* Court held that an individual injured by a federal agent's violation of the search and seizure provision of the Fourth Amendment may seek damages for constitutional torts (deprivation of a federal constitutional right) against the *agent*.[72] Meyer wished to extend *Bivens* by bringing such an action not against a federal agent but against a federal agency. The Court would not allow the extension.

In *Bivens*, the petitioner sued agents of the Federal Bureau of Narcotics, not the Bureau itself. Here, Meyer was suing FSLIC rather than the FSLIC employee who actually terminated Meyer's employment. By suing the agency directly, Meyer was attempting to circumvent the defense of qualified immunity based on one's official position. However, Justice Thomas, writing for the Court, reasoned that Meyer's attempt "would mean the evisceration of the *Bivens* remedy, rather than its extension. It must be remembered that the purpose of *Bivens* is to deter *the officer*."[73] A cause of action was allowed against the federal officials in *Bivens* because the injured party was precluded from suing the agency through the doctrine of sovereign immunity. "In essence, Meyer asks us to imply a damages action based on a decision that presumed the *absence* of that very action."[74] By allowing suits against the agency directly for constitutional torts, individual officers would be invulnerable and the deterrent effects of *Bivens* would be nullified. Moreover, allowing a direct damages action against federal agencies would create a large financial burden for the federal government. The Court felt that Congress should decide on matters which would create a dramatic expansion of government liability. Since the Supreme Court refused to extend *Bivens* to federal agencies, Meyer had no *Bivens* cause of action for damages against FSLIC.

Deference to Regulatory Interpretation

In *Thomas Jefferson Univ. v. Shalala*,[75] the Court adhered to a long line of precedent by giving substantial deference to an agency's interpretation of its own regulations. In affirm-

ing the Third Circuit Court of Appeals, the Supreme Court in a 5-4 decision upheld as reasonable the Health and Human Services Secretary's interpretation of a regulation governing reimbursement for educational activities conducted by Medicare providers.[76] The Secretary had ruled that the regulation in question barred the petitioner, a non-profit educational institution that operates a hospital and medical college, from receiving Medicare reimbursement for the hospital's non-salary costs in administering an educational program.

The petitioner challenged the Secretary's construction of the regulation under APA which requires the reviewing court to set aside any agency action which is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[77] The court wrote that its role is not to choose, among several alternative interpretations, the one which is believed to best serve the regulatory purpose; instead, the court is to defer to the agency unless the agency's interpretation "is plainly erroneous or inconsistent with the regulation [and] an 'alternative reading is compelled.'"[78] Moreover, in giving "substantial"[79] or "broad"[80] deference to an agency's interpretation of its own regulations, Justice Kennedy reasoned that such deference is especially required when the regulation involves complex technical matters for which the agency's expertise is needed.

Here, the Secretary's interpretation of the regulation was not plainly erroneous but the most plausible and sensible interpretation. The Court went on to state that the Secretary's interpretation was superior to the petitioners but added that the Secretary's interpretation need not be superior to be upheld: the interpretation only had to be "reasonable" for it to be given "controlling weight."[81] In addition, the Court refuted the petitioner's argument that the Secretary's interpretation was inconsistent with past agency views. Therefore, the Secretary's construction was not subject to the maxim that "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference than a consistently held agency view.'"[82] Justice Kennedy also rejected the argument that the Secretary's interpretation is not worthy of deference because it is "precatory" and "aspirational" in nature. "We do not lightly assume that a regulation setting forth specific limitations on the reimbursement of costs under a federal program is devoid of substantial effect."[83]

In dissent, Justice Thomas, joined by Justices Stevens, O'Connor, and Ginsburg stated that the regulation did not impose substantive restrictions on the reimbursability of approved educational activities and the Secretary was wrong to interpret the language as imposing a substantive limitation when, in fact, the language spoke in vague generalities. Generalized expressions should not be "interpreted" into substantive rules.[84] By giving an indefinite regulation substantive effect, the dissent concluded that "the Court disserves the very purpose behind the delegation of law making power to administrative agencies, which is to 'resol[ve]...ambiguity in a statutory text.'"[85] By allowing regulatory ambiguity to stand, affected parties will have inadequate notice regarding the agency's views of the law. Justice Thomas stated that the Secretary replaced statutory ambiguity with regulatory ambiguity. "It is perfectly understandable, of course, for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process."[86]

However, in another recent case, the Court, in an unanimous decision, refused to defer to an agency's interpretation. In *Brown v. Gardner,*[87] the Supreme Court held that an agency's interpretation of a statute need not be deferred to when the interpretation is inconsistent with the plain language of the statutory text.

After surgery in a Department of Veterans Affairs facility, the respondent alleged that he suffered adverse side effects. The respondent claimed disability benefits under 38 U.S.C. Section 1151, which requires the Veterans Administration to compensate for "an injury, or an aggravation of an injury" that occurs "as the result of " VA treatment.[88] The Veterans Administration denied the claim based on the agency's regulation that interpreted Section 1151 as only covering an injury which resulted from negligent treatment by the VA or an accident occurring during treatment.[89] The Court of Veterans Appeals reversed,[90] holding that Section 1151 does not require fault or accident as set forth in Section 3.358(c)(3). The Court of Appeals for the Federal Circuit affirmed[91] and the Supreme Court, in an unanimous decision, also affirmed.

The Court reasoned that the statutory context of Section 1151 clearly does not allow for an inference to be drawn that "fault" or "accident" is required. Several instances of the term "injury" within the statute were used in a "fault-free sense" and, thus, "without any suggestion of fault."[92] Moreover, the fact that Congress made no mention in the statute of fault on the part of the Veterans Administration makes it unreasonable to impose upon a claimant the burden of showing such fault in order to obtain compensation.

The Veterans Administration attempted to argue that when

Congress reenacted the predecessor of Section 1151, the agency's requirement of showing fault was given Congressional ratification. However, the Court has previously held that subsequent reenactment does not imply adoption of an administrative regulation or has any interpretive effect when the agency regulation is inconsistent with the statute.[93] Furthermore, when the statute was reenacted, the legislative history shows no discussion concerning the VA regulation or any other evidence to show that Congress even knew of the agency's stance. "In such circumstances we consider the...re-enactment to be without significance."[94]

The Court summarily disposed of two additional arguments put forward by the VA. Congress' legislative silence on the Veterans Administration's regulatory practice for the last six decades has no significance and does not serve "as an implicit endorsement of its fault-based policy."[95] Also, the fact that the agency's interpretation has endured undisturbed for 60 years does not require judicial deference when the regulation is inconsistent with the statute. Age can increase the strength of an administrative interpretation but "[a] regulation's age is no antidote to clear inconsistency with a statute."[96]

The Supreme Court has also vacated and remanded to the Eighth Circuit a case involving the Department of Agriculture's interpretation of a Farmers Home Administration (FmHA) regulation. In *Schmidt v. Espy*,[97] the appellants' FmHA loans were secured by equipment, a dwelling, farmland, and livestock. The Schmidts later sale of the livestock was considered bad faith and the Secretary interpreted an FmHA regulation as requiring a denial, based on such bad faith, of the Schmidt's request for a lease back/buyback . The court originally ruled the interpretation to be rational and, therefore, worthy of deference. "[W]e cannot say the Secretary's interpretation of the regulation 'is without a rational basis'...[and] [w]e thus defer to the Secretary's interpretation of the regulation..."[98]

In *Shalala v. Guersey Mem. Hosp.*,[99] the issue centered on the Secretary of Health and Human Services' interpretation of a Medicare reimbursement guideline and the guideline's validity with regard to the Administrative Procedure Act. The Secretary interpreted the guideline as requiring losses incurred by the respondent hospital as a result of refinancing capital improvement bonds to be amortized; the hospital claimed it was entitled to full reimbursement in the year of the refinancing in accordance with generally accepted accounting principles ("GAAP"). Citing *Thomas Jefferson Univ., supra,* the Court, in a 5-4 decision, held the Secretary's position "is a reasonable regulatory interpretation, and we must defer to it."[100]

According to the Court, guidelines or interpretive rules are issued to advise the public of the agency's construction of the statutes and rules which the agency administers. These guidelines are not required to be issued in accordance with the notice-and-comment provisions of the APA, although these guidelines do not have the force and effect of law. APA rulemaking would only be required if the guideline in question adopted a new position inconsistent with any of the Secretary's existing regulations.[101] The hospital claimed that the Medicare regulations required reimbursement according to GAAP and, because the guideline departed from GAAP, the guideline effected a substantive change and was thus voided by the Secretary's failure to previously issue the guideline in accordance with the APA's notice-and-comment provisions. However, the Court held that Medicare regulations do not require reimbursements to be made in accordance with GAAP. Thus, the Secretary's interpretation of the guideline justifying a departure from GAAP did not cause a substantive change to the regulations. Thus, the guideline did not require notice and comment and, therefore, was valid.

Writing for the Court, Justice Kennedy concluded that since Medicare does not require adherence to GAAP, the Secretary's determination of the guideline was a valid and reasonable interpretive rule. The Secretary's position is supported by the regulation's text and the overall structure of the regulations and is therefore entitled to deference as a reasonable regulatory interpretation.[102]

In dissent, Justice O'Connor stated that Medicare requires reimbursement to be carried out in accordance with GAAP. Justice O'Connor wrote that the Court has an "obligation to defer to an agency's reasonable interpretation of its own regulations, particularly 'when, as here, the regulation concerns a complex and highly technical regulatory program'" requiring agency expertise.[103] However, according to Justice O'Connor, the Secretary's interpretation of the guideline is inconsistent with the Medicare Act and, thus, the Secretary's interpretation is "unreasonable and unworthy of deference."[104]

The past several months have proven to be quite interesting for Supreme Court cases which have influenced public administration. As the Court currently has several cases on its docket which may greatly affect public employees and the entities they serve, public administrators would be wise to stay informed of the Court's decisions during the year. ★

Notes

[1]115 S.Ct. 394 (1994).

[2]U.S. CONST. amend. XI. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." The Supreme Court has subsequently made clear that a suit against an entity that is an arm of the state may also be barred by the Eleventh Amendment. *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280(1977).

[3]45 U.S.C.A. Sec.51 *et seq.* (West 1986 & Supp. 1994).

[4]Article I, Sec.10, cl.3. The Compact Clause states: "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

[5]115 S.Ct. at 400.

[6]Id. at 406.

[7]Id. at 401.

[8]Id. at 404.

[9]Id. at 409.

[10]Id. at 410.

[11]Id. (emphasis included).

[12]27 F.3d 84(4th Cir.), *vacated*, 115 S.Ct. 567 (1994).

[13]Id. at 85-86.

[14]Id. at 86.

[15]Id. at 87-88.

[16]Id. at 89.

[17]5 U.S.C.A. Sec.704(West 1977 & Supp 1994).

[18]114 S.Ct. 1719(1994).

[19]10 U.S.C. Sec.2687(1983 & Supp. 1994).

[20]5 U.S.C.A. Sec.704.

[21]114 S.Ct. at 1724 (quoting *Franklin v. Mass*, 112 S.Ct. 2767, 2774(1992)). The APA defines "agency" as: each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include (A)the Congress; (B)the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia. 5 U.S.C. Sec.701(b)(1), 551(1).

[22]Id.

[23]Id.

[24]In addition to concluding that the actions of the Secretary and the Commission were not reviewable under the APA because the actions were not final nor were the President's actions reviewable as the Chief Executive is not considered an agency under the APA, the Court held that the respondents' claim that the President exceeded his authority under the 1990 Act is not a constitutional claim but a statutory claim. Here, when a statute committed decisionmaking to the President's discretion, judicial review of the President's decision is not available.

[25]114 S.Ct. 2251 (1994).

[26]Administrative Procedure Act Sec.7(c), 5 U.S.C. Sec.551(West 1977 & Supp. 1994).

[27]114 S.Ct. 2255-2257.

[28]114 S.Ct. at 2259 (quoting *Wong Yang Sung v. McGrath*, 339 U.S. 33,41(1950).

[29]114 S.Ct. 1878(1994).

[30]461 U.S. 138(1983).

[31]114 S.Ct. at 1886.

[32]Id.

[33]Id. at 1887.

[34]Id. at 1888 (emphasis added).

[35]Id. at 1891.

[36]Id. at 1899-91.

[37]Id. at 1898.

[38]21 F.3d 1238(2d Cir.), *vacated*, 115 S.Ct. 502(1994).

[39]Id. at 1245.

[40]Id. at 1246.

[41]Id.

[42]Id. The court also ruled that the defendants, as government officials, were not entitled to qualified immunity for the defendants should have reasonably understood that Jeffries' "clearly established" constitutional rights were being violated. "The defendants should have known from existing law that they could not remove Jeffries from the department chair on the basis of his speech."Id.

at 1248.

[43]*Jeffries v. Harleston*, No. 93-7876(2d Cir. April 4, 1995)(LEXIS, Genfed library, U.S.App. file).

[44]1995 U.S.App. LEXIS 7639, 7648.

[45]Id. at 7652.

[46]990 F.2d 1271(D.C. Cir. 1993), *aff'd in part, rev'd in part*, 115 S.Ct. 1003(1995).

[47]5 U.S.C. App. Sec.501(b)(West Supp. 1994).

[48]*U.S. v. National Treasury Employees Union*, 115 S.Ct. 1003(1995).

[49]115 S.Ct. at 1013.

[50]Id. at 1014.

[51]Id. at 1015.

[52]Id. at 1016.

[53]Id. (emphasis included).

[54]Id. at 1019.

[55]Id. at 1024.

[56]Id.

[57]Id. at 1030.

[58]5 U.S.C.A. Sec.552(West 1977 & Supp. 1994).

[59]114 S.Ct. 1006(1994).

[60]Id. at 1012(quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 360-361(1976)).

[61]5 U.S.C.A. Sec.552(a).

[62]975 F.2d 1105(1993).

[63]5 U.S.C.A.Sec.552(b)(6).

[64]114 S.Ct. at 1014.

[65]Id. at 1014.

[66]Id. at 1013-14(quoting *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773(1989)).

[67]Id. at 1015(quoting *DOJ v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763(1989)).

[68]Id. at 1015.

[69]114 S.Ct. 996(1994).

[70]The Federal Deposit Insurance Corporation(FDIC) was substituted for FSLIC as FSLIC's statutory successor upon enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, better known as FIRREA.

[71]403 U.S. 388(1971).

[72]Id. at 397.

[73]114 S.Ct. at 1005(emphasis included).

[74]Id.(emphasis included).

[75]114 S.Ct. 2381(1994).

[76]42 C.F.R. Sec.413.85(c)(1994).

[77]5 U.S.C.A. Sec.706(2)(A).

[78]114 S.Ct. at 2386(quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430(1988).

[79]Id.

[80]Id. at 2387.

[81]Id. at 2388(quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414(1945)).

[82]Id.(quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30(1987).

[83]Id. at 2389.

[84]Id. at 2390.

[85]Id. at 2393(quoting *Pauley v. Beth Energy Mines, Inc.*, 501 U.S. 680, 696(1991).

[86]Id.

[87]115 S.Ct. 552(1994).

[88]38 U.S.C.A. Sec.1151(West Supp. 1994).

[89]38 C.F.R. Sec.3.358(c)(3)(1993) only covers an injury that "approximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA or from the occurrence during treat ment of an "accident."

[90]1 Vet. App. 584(1991).

[91]5 F.3d 1456(1993).

[92]115 S.Ct. at 555.

[93]*See Demarest v. Manspeaker*, 498 U.S. 184(1991); *Massachusetts Trustees of Easter Gas & Fuel Associates v. United States*, 377 U.S. 235(1964).

[94]115 S.Ct. at 557(quoting *United States v. Calamaro*, 354 U.S. 351(1957).

[95]Id. at 556.

[96]Id. at 557. In addition, Congress did not establish judicial review for VA decisions until 1988. "'Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations 'unscrutinized and unscrutinizable existence' could not alone, therefore, enhance any claim to deference.'" *Brown v. Gardner*, 5 F.3d 1456, 1463-64(1993).

[97]9 F.3d 1352(8th Cir. 1993),*vacated*, 115 S.Ct. 43(1994).

[98]Id. at 1353(quoting *Missouri Dep't of Social Servs. v. United States Dep't of Educ.*, 953 F.2d 372,375(8th Cir. 1992)).

[99]63 U.S.L.W. 4205(U.S. Mar. 6, 1995).

[100]Id. at 4207.

[101]Id. at 4205.

[102]Id.

[103]Id. at 4211.

[104]Id.