American Society for Legal History Conference: November 2009

Panel Proposal: The Law of Administration in the Early American Republic

Chair: Jerry L. Mashaw, Sterling Professor of Law and Management, Yale University

Panelist: Nicholas Parrillo, Associate Professor of Law, Yale University

Panelist: James Pfander, Professor of Law, Northwestern University

Panelist: Gautham Rao, Postdoctoral Fellow, Library Company of Philadelphia, Program in Early American Economy and Society; Assistant Professor of History, Rutgers/NJIT

Commentator: William J. Novak, Associate Professor of History, University of Chicago

In American legal history, administrative law is stereotypically viewed as a quintessentially modern field, part and parcel of the progressive response to the corporate industrial economy. The stereotype may be true if we understand "administrative law" in narrowly presentist terms as judicial review of administrative action under the model of, say, the Administrative Procedure Act of 1946 or the Interstate Commerce Act of 1887.

But administrative law can be understood more broadly—as the battery of institutions that a liberal democratic polity employs to compel its officers to carry out the wishes of the electorate while still honoring private rights. So understood, the history of American administrative law begins with the republic itself, and it exemplifies a fuller range of the challenges to be met, and of the tools available, in the struggle to shape official action.

Our panel aims to capture this longer, richer history. Rao examines early presidential efforts to assert control over remote officers ensconced in their local communities, as well as judicial choices on whether to support such efforts. Pfander considers the way legislative indemnification moderated the impact of common law damage actions for officers found to have used their powers in ways not strictly lawful. And Parrillo analyzes legislators' changing views of the kind of monetary incentives best-suited to channel official discretion.

The Rise of Non-Profit Government in America:
Incentives, Scandal, and Discretionary Judgment

by Nicholas Parrillo

Abstract

From the colonial period through much of the nineteenth century, public officers in the United States frequently received their pay in the form of fees-for-service and commissions, that is, forms of compensation that varied, in a direct and objective way, with the business of their offices and the way in which they exercised their powers. To give just a few of numerous possible examples: constables received a fee for each arrest they made; public prosecutors, a fee for each conviction they won; tax collectors, a percentage of their collections and/or of the forfeitures and penalties they imposed; naval officers, a percentage of the value of the ships they captured. My Ph.D. thesis, now in progress, aims to document and explain this lost system of officer pay, as well as its gradual replacement—in different offices and jurisdictions at different times—by the fixed salaries that we now take for granted in the public service. Essentially, I am tracing the way in which legislators, by reforming the way officers were paid, made the absence of the profit motive a defining feature of "government."

Based on my research so far, it seems that several distinct factors caused the change. The paper that I propose to give at ASLH will discuss one of the most important factors: the increasingly prevalent belief, among legislators, that officers needed to make case-specific judgments whose soundness could not be assessed by a simple, objective formula. To take one example, initially it was not terribly objectionable to give the public prosecutor a pecuniary incentive to maximize convictions, so long as the crimes that could be prosecuted were relatively few in number and mostly viewed as morally evil. But as legislators gradually created ever more crimes (especially technical regulatory and tax-related offenses), fee incentives drove prosecutors to convict huge numbers of small-time offenders who, though legally guilty, did not, in the eyes of voters, deserve punishment as a matter of policy and morals. The resulting popular outrage pushed lawmakers to switch prosecutors from fees to salary. The idea was to give them the financial independence to exercise discretion in the selection of targets, in a way that was (and, perhaps more importantly, was *perceived* as) founded on the particular equities of each individual case, as opposed to self-interest. In researching and writing this paper, I shall draw upon this and several other examples of legislative efforts to sensitize and judicialize—and thereby legitimize—the exercise of power by an officialdom that was being called upon to make more complex and less-constrained decisions than in the past. The cases to be analyzed will include tax collection, city policing, quarantine administration, and the adjudication of veterans' pensions.

Public Wrongs and Private Bills: Legislative Indemnification and Official Compliance with Law

By James E. Pfander

Abstract

Students of the history of government accountability in the United States tend to regard the antebellum era as one in which strict common law rules of official accountability prevailed. In one oft-cited case, *Little v. Barreme*, the Supreme Court found that a naval officer was *personally* liable for following presidential orders to seize a vessel suspected of trading with the French. Scholars conventionally contrast the strict regime of official accountability in *Little v. Barreme* with the more forgiving doctrines of official discretion and official immunity that came to characterize the accountability law of the later nineteenth and twentieth centuries.

In stressing relatively strict common law liability, conventional accounts of the antebellum period often omit a key institutional feature. Under the system of private legislation in place at the time, federal government officers were free to petition Congress for the passage of a private bill appropriating money to indemnify the officer for personal liability imposed on the basis of actions taken in the line of duty. Captain Little pursued this avenue of indemnification through private bill, and did so successfully. As a result, the ultimate loss associated with that officer's good faith effort to enforce federal law fell on the government rather than on the officer himself. The indemnifying effect of private legislation may explain in part the Court's willingness to uphold the personal judgment against Captain Little. Strict official liability coupled with a regime of discretionary indemnification served rule of law values at a time when widespread adherence to sovereign immunity barred direct claims against the government.

This paper fills out the picture of government accountability in the nineteenth century by clarifying the practice of congressional indemnification during the period 1789 to 1861. The paper will identify and analyze cases in which federal government officers sought indemnity from Congress through a petition for private relief. While the congressional reports do not always provide reliable information on the rationale of particular action (favorable or unfavorable to the petitioner), we have located a number of relatively complete records. We use this information to examine the way official liability, as administered by the courts, interacted with private relief legislation, as administered by Congress, to shape the incentives of government officers to comply with law. Perhaps most strikingly, we find evidence that nineteenth century legislators viewed a well-founded petition as payable more as a matter of right than as a matter of legislative grace. We conclude with an evaluation of the incentives to comply with law that this system of discretionary indemnification created for federal officials.

Administrative Law's Scandalous Past:
Rethinking Jefferson's Embargo

by Gautham Rao

Abstract

In the early republic, public administration was the terrain of a pitched battle over the location of political authority in the early republic--over the soul of the early American state. Commercial politics occasioned this crisis. In 1807, President Jefferson turned to an Embargo--a federal prohibition on American commerce with foreign markets--to protect American commerce from rapacious European privateers and press-gangs. Yet, American merchants fiercely opposed the Embargo. After all, these merchants owed their wealth to the very European markets that Jefferson sought to punish.

The struggle between Jefferson and his mercantile antagonists unfolded at the customhouse. The customhouse was a unique space: the littoral convergence between the state's coercive authority and the merchants' acquisitive spirit. During the Embargo, these two forces exerted countervailing forces on federal customs officials. On the one hand, by centralizing political authority, and monopolizing statutory construction, Jefferson devised new administrative means to compel subordinate officers to execute national policy. Here, I argue, lay the origins of administrative law as we understand it--what Frank Goodnow called "the physiology of government," or how government manages and coordinates rulemaking, adjudication, and execution. On the other hand, the merchants used an array of traditional, legal and extralegal tactics, which they had perfected in the colonial years, to compel customs officials to undermine, and ultimately subvert the Embargo. Justice William Johnson's circuit decision in *Gilchrist v. Collector of Charleston* (1808) handed the merchants a victory. Johnson argued that the customhouse was a decidedly parochial institution, subject, perhaps, to national recommendations, but ultimately built upon local commercial consent. *Gilchrist* effectively shattered Jefferson's forward-looking administrative vision, and less than a year later, he would leave the presidency, and the dead letter of the Embargo, well behind.

By uncovering this heretofore overlooked administrative struggle between national power and local merchant capitalists, the paper speaks to central themes in the legal history of the early American republic. Most importantly, legal historians understand how private power marked the development of commercial and other fields of private law. Yet, I suggest that the merchant community, through formal and informal strategies, also indelibly stamped a regime of public law. Public administration was never a static field of hierarchical, value-neutral rulemaking. On the other hand, from the very first days of the story of American political development, administrative law affected, and was affected by, the legal, political, and economic forces that shaped society writ large.