Voting for President as if Administrative Law Depended Upon It?
by the Honorable Eric L. Lipman

Among the most compelling and interesting articles published this summer is an analysis from Thomas J. Miles, Assistant Professor at the University of Chicago Law School, and Cass R. Sunstein, Professor at the Harvard Law School. Their article is entitled "Depoliticizing Administrative Law."

Following a review of administrative law cases that were handed down between 1990 and 2006, the professors assert that federal judges appointed by one political party are significantly more likely to invalidate the agency actions of administrations headed by a President of the other political party; and that this result is even more certain when the three-judge panel is comprised solely of judges appointed by the party opposite of the current administration. Miles and Sunstein conclude that when agencies under Democratic administrations face three-judge panels comprising only of circuit court judges appointed by earlier Republican Presidents, the likelihood that the agency action will be invalidated spikes upward. The phenomenon also works in reverse; as unified panels of appointees of Democratic Presidents are more likely to invalidate interpretations of law urged by agency officials in Republican administrations and to hold that these officials acted arbitrarily on questions of policy and fact.

The statistics assembled by Miles and Sustein are compelling and raise important questions about the rule of law. As the authors summarize:

> The most important point is that it remains true that notwithstanding the evident aspiration of both *Chevron* and *State Farm* [that federal courts defer to the specialized expertise of executive branch agencies], politicized voting patterns are unmistakable in the federal courts. Recall that in *Chevron* cases, a Democratic appointee on a unified panel is 31.5 percent more likely to vote in favor of liberal agency decisions than conservative agency decisions—and that a Republican appointee on a unified panel is 40 percent more likely to vote in favor of conservative agency decisions than liberal agency decisions. The consequence is that important agency decisions are struck down, or validated, when a different result would obtain on a mixed panel. And if an NLRB order or EPA rule is invalidated by a D-D-D [unified Democratic panel] or R-R-R [unified Republican] panel, the invalidation will usually be final [because a grant of *certiorari* to the U.S. Supreme Court in such cases is so rare]. In a system committed to the rule of law, to impartial justice, and to similar treatment of the similarly situated, this is a serious problem.

Perhaps worse still, the work of Professors Miles and Sunstein comes against the backdrop of an analysis published in *The Weekly Standard* late last year which asserted that the next Administration will be able to appoint enough Judges to the U.S. Circuit Courts of Appeal to determine the partisan balance on as few as eight, but

perhaps as many as twelve, of the thirteen federal judicial circuits. Thus, with the Miles-Sunstein study in hand, we can see how the prospect of strengthening or diluting the number of "unified panels" Republican or Democrat appointees has widespread significance. If appointment to, and partisan dominance of, appellate panels are strongly correlated to substantive results in administrative law matters, there is genuine cause for concern.

Indeed, Professors Miles and Sunstein argue that, if anything, their analysis understates the impact of polarized voting in administrative law cases. The professors assert that agency lawyers who litigate administrative law matters are already aware of this phenomenon and tend to settle cases when facing a unified panel of circuit court judges appointed by a politically opposite Administration. The authors claim:

> When an agency must defend a liberal decision before a conservative court, it is more likely to settle, and conversely, when an agency must defend a conservative decision before a liberal court, it is more likely to settle. The observed court decisions are therefore drawn from cases in which settlement is less likely, and the set of observed decisions does not encompass these cases (we do not know exactly how many there are) in which the judicial outcome would likely be predictably ideological. Were we to observe a counterfactual world in which all cases proceeded to trial, the observed decisions would include a somewhat larger share of (and thus a high rate of) predictably ideological judicial decisions.

Because the critique that Professors Miles and Sunstein make of the federal judiciary is so detailed and substantive, the questions that they raise are worthy of both close review and further rounds of research. Among the concerns that I had while reading their analysis, was the team's willingness to "recode," or to exclude entirely, cases which did not fit well into the categories they established at the outset of their study. I wanted to know more about the nature and number of the cases that did not fit into these larger frames; wondering whether the special handling of these outliers tended to exaggerate the impacts the team identified. Likewise, in a study where a key measurement is whether the agency's action was later validated by the court, I wondered whether this frame operated as a proverbial "thumb upon the scale" – treating circuit panels of "big government progressives" more gingerly than it did "limited government conservatives." Even in combination, however, these tiny methodological quibbles do not blunt the force of Miles and Sunstein's claims or their important messages to the legal community.

The team concludes their article by suggesting a range of possible reforms to counteract partisan-polarized voting – urging measures such as updating case assignment rules and doctrinal changes in administrative law. In my own view, their first prescription is the best: More sunlight. Greater awareness of, and further research upon, the phenomena identified in this study could lead to the needed self-correction among judges. As Miles and Sunstein write: "Perhaps a little sunlight, with respect to voting patterns, might induce a degree of self-consciousness and self-scrutiny, thus

reducing politicized voting. At the very least, the data suggest that judges on unified panels should be cautious about behaving in a way that fits with partisan predictions."

Here in Minnesota, I will do my part. I am asking all administrative law practitioners to do two things before casting a ballot in the upcoming Presidential election: The first is to closely review the Miles-Sunstein article (which is accessible here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150404); and the second is to send a copy of the article to a Judge whom they know and admire.

In that way, perhaps none of us will need to think of administrative law as we approach the voting booth this November.

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