For the Record

Getting Around the Trump Guidance EOs

In their Spring 2020 article “Regulatory Agencies Get Guidance on ‘Guidance,’” John Cohrsen and Henry Miller discuss two Trump administration executive orders (EOs) intended to prevent the imposition of new requirements by agency “guidance” documents. The authors rightly mention reasons for skepticism that the EOs will solve the problem.

I would add another reason: So long as courts defer to merely “reasonable” agency interpretations under Chevron (as to statutes) and Auer (as to regulations), the EOs will not solve the problem. Their chief effect will be to drive interpretations underground. Instead of jumping through the EOs’ hoops, agencies will bring prosecutions based on interpretations that first appear in court briefs. And because EOs are not enforceable in court, judges will continue to defer under Chevron and Auer.

The EOs also lack teeth. For example, one bars agencies from treating a violation of a standard of conduct “announced solely in a guidance document as itself a violation of applicable statutes or regulations.” But no agency will ever think that its guidance document violates that prohibition. All will indulge themselves in the thought that the announced standard of conduct was always to be found somewhere in the statute or regulation being interpreted. That is, after all, what agencies have been doing all along. The source of the problem is judicial deference.

The Trump administration lost an opportunity to fix the problem at its source during the recent Kisor litigation in which the Supreme Court considered and by one vote rejected an argument that Auer should be overruled. The solicitor general should instead have been instructed to acquiesce in the argument that Auer (and implicitly Chevron) should be overruled. That might have turned the tide.

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BRIEFLY NOTED

Sticky Funeral Prices and Rigid Regulations in the COVID–19 Crisis

Thousands of Brooklynites have lost their lives to COVID-19. Last spring, at the height of the tragedy in New York City, relatives of the deceased were frantically scrambling to find a funeral director to handle arrangements for their loved one. Time was ticking. Hospitals wanted bodies collected as soon as possible. The city’s medical examiner posted online that any bodies left unclaimed for two weeks would be buried on Hart Island, New York City’s potter’s field.

Early on, Brooklynites were calling Amy Cunningham, owner of Fitting Tribute Funeral Services, to ask about prices. Soon, they were only asking whether she would handle their case. Desperate to find help, some Brooklynites called John Quevedo, a funeral director in Yonkers, in the city’s northern suburbs. As he talked to them, he often wondered how many funeral homes had turned them down, forcing them to look outside the city.

Given that there are 256 funeral homes in New York City, there must have been a lot of fruitless phone calls.

The shortage of funeral directors wasn’t surprising. The number of deaths in New York City during the COVID-19 spike was six times higher than normal. What’s more, the spike increased the cost of providing direct cremations. Funeral directors tell harrowing stories of retrieving COVID-19 victims’ bodies from cluttered apartments and disorganized hospital trailers. Soon, funeral directors were turning to outside sources of assistance.
help, paying twice the normal rate to have “trade guys” pick up bodies. Everyone was dealing with dwindling supplies of PPEs. And once they had the bodies, they still had to figure out how to get them cremated. Queues at local crematories forced them to either travel to available retorts far away or store corpses in refrigerators (or air-conditioned chapels) for longer than normal.

**A new price equilibrium?** As an economist, I asked Cunningham whether she had increased her prices to respond to the surge. She said she hadn’t and knew of no one who had. Nor had she heard of anyone “upselling” grieving families into buying more expensive options that provide larger margins. I asked her why she hadn’t raised prices and she said she wasn’t sure she could do so legally. She quickly added that she hadn’t given the issue much thought because she was too busy waiting in line at the medical examiner’s offices, retrieving bodies, driving to crematories, and answering phone calls.

I looked into whether funeral directors could legally raise their prices. A lawyer who represents companies in the industry told me they could do so if they updated their “General Price List” (GPL), required by the Federal Trade Commission. They would have to honor the earlier prices for anyone who mentioned seeing or hearing them, but for new customers they could charge higher prices.

Though the FTC wouldn’t pose a problem for funeral directors, New York City’s Department of Consumer and Worker Protection might. On March 16, the agency made “price gouging illegal for any personal or household good or any service that is needed to prevent or limit the spread of or treat the new coronavirus (COVID-19).” It takes some parsing, but this stricture seems to apply to funeral services because the licensing laws are often justified as protecting the public health by ensuring that only trained individuals handle bodies containing infectious disease. I emailed the department’s press secretary to ask how many price-gouging complaints had been filed against funeral homes during the crisis. She replied that seven had been received and her agency was investigating.

If New York’s anti-price-gouging law does apply to funeral homes, it would give them some leeway: it does permit increases of 10%. The typical Brooklyn funeral home charges $1,878 for a direct cremation, according to Funeralocity.com. An extra $187.80 would barely cover the increased cost of retrieving bodies and would fall far short of what some funeral homes have been paying for refrigeration and travel to faraway crematories.

It might seem sensible to impose a price ceiling in the Brooklyn cremation market. Supply is highly inelastic (as is demand, usually), so without an intervention prices would soar without doing much to alleviate the shortage. Even with sky-high prices, would-be funeral directors can’t quickly enter the stringently regulated funeral trade. And few families will choose an option other than cremation even as prices rise. Thus, it seems natural to suppose that higher prices wouldn’t change the supply of cremations but would only affect how much families pay and funeral directors receive.

But elasticities are not written in stone. With the stroke of his pen, New York Gov. Andrew Cuomo increased the elasticity of supply by signing an executive order allowing out-of-state funeral directors to assist New York funeral directors. He could have done more: notice the use of the word “assist” instead of “replace.” The limited effort likely was necessary to win the support of the New York Funeral Directors Association—and that’s why I’m skeptical the order would have done much to alleviate the shortage at the height of the surge.

**Barriers to entry** / New York’s funeral regulations—and those of many other U.S. states—create barriers to entry that are worsening shortages in the COVID-19 crisis. For instance, only funeral directors licensed by the State of New York can legally remove bodies from hospital morgues and medical examiners’ offices. Thus, Brooklynites can get help from a funeral director like Quevedo in Yonkers, but not from a funeral director right across the bay in New Jersey.

Across the country, funeral regulations can be reformed in ways that make the supply of cremation services more elastic without eroding public safety. A good start would be to eliminate laws that reflect the needs of bygone eras. In recent years, most bodies have been cremated: for example, in 2012 in Florida, 63% of bodies were cremated, 33% were buried, 3% were entombed, and roughly 0.7% were donated to medical schools. The rate of embalming has fallen along with the burial rate; COVID-19 will accelerate the descent. Despite this market shift, funeral directors in New York and many other states are required to know how to embalm a body and funeral homes must have an embalming preparation room. These laws have ensured the funeral industry has excess capacity—but of the wrong type to handle the current pandemic.

Brooklynites can also thank regulations for the long queues at local crematories. New York requires that crematories be in nonprofit cemeteries. Similar-sized states without this restriction have far more crematories: compare New York’s 49 to Florida’s 206 and Texas’ 186, based on 2019 data from the Cremation Association of North American.

You’ve got to do something with dead bodies. Today, the only important substitute to cremation is burial. When Cunningham couldn’t handle any more cremation cases, she started advising callers to think about simple burials. They’re more expensive, but they can be done quickly. Together with the option of Hart Island, simple burials are what give the demand for cremations its elasticity.

**Reform** / Some funeral directors say they want to charge lower prices to families that would struggle to pay the list price or have lost multiple members to COVID-19. But offering such discounts would violate the FTC’s one-price-fits-all Funeral Rule. The FTC should relax this prohibition during the pandemic.
The Funeral Rule is currently up for review and the FTC is accepting comments. Here’s my recommendation: First, the law should be defanged a bit, so that funeral directors are comfortable raising prices in response to unanticipated shocks. That said, the FTC should continue to require death-care firms to provide price information. I would mandate that General Price Lists be posted on funeral home websites and extend that requirement to cemeteries. Without the Funeral Rule, consumers could not be assured of easy access to prices over the phone or on consumer websites like Funeralocity.com and Parting.com. Without transparency, funeral homes might have less pressure to keep prices competitive.

Like ventilators, markets might underprovide mortuary refrigerators and cremation retorts during pandemics. What Brooklyn funeral home would want to invest in refrigeration capacity just in case the pandemic drags on? What Middle-America crematory would want to invest in retorts in case its city becomes the next epicenter of the disease? But many consumers would benefit from such investment if faced with the loss of a relative during this pandemic. Instead of encouraging the acquisition of refrigeration capacity or the creation of crematories, public policies are discouraging them by making funeral providers reluctant to pass on their costs to consumers.

Conclusion / During the spring wave of COVID-19 deaths, Brooklynites faced shortages of funeral directors, mortuary refrigerators, and cremation retorts. But if Cunningham’s experience is broadly correct that funeral directors did not increase their prices, how was the disequilibrium in supply and demand handled?

Another funeral director was quoted as saying that he no longer accepted cremation cases unless they were requests from families he had served before. I don’t know about you, but I’m thinking about buying an expensive cremation urn at what looks like a well-equipped funeral home—but I’d rather leave my fate to a less regulated market.

The Politicization of Disaster Relief

BY STEVEN HORWITZ AND E. FRANK STEPHENSON

As the COVID-19 crisis was exploding in late March 2020, Michigan Gov. Gretchen Whitmer claimed that medical supply “vendors are being told [by the federal government] not to send stuff here to Michigan.” She asserted that her state had “been uniquely singled out” because of her criticizing President Trump’s response to the pandemic.

We don’t know if her allegation is correct. However, a recent study does suggest that states that supported Donald Trump in the 2016 election appear to have received small-business loans as a percentage of eligible payroll that were much larger than the coastal states that he lost. Rural Midwestern states like the Dakotas and Nebraska got funds that covered 70% or more of their eligible payroll. The comparable numbers for New York and California were 40% and 38% respectively, or about half of what the Trump-supporting states got.

For many, such favoritism is seen as a unique feature of the Trump administration. However, the politicization of resource allocation in a crisis is nothing new. Here we provide a brief overview of research finding that political considerations influence the allocation of aid during crises.

The New Deal / Economic historian Gavin Wright examined the disparate distribution of loans and relief during the New Deal era with an eye to explaining the generous aid directed to western states and the paucity of aid flowing to the South. Wright used simple cross-state regression models to compare the influence of economic variables (e.g., unemployment) and political variables on both the allocation of spending and work relief jobs across states. His results suggest that political factors contributed to the pattern of relief and he points to the high variability of Democratic voting in western states as a key factor in the generous level of aid directed to those states. The implication is that the Roosevelt administration steered aid to states where it would be of most use in getting the president reelected. By contrast, the South had a strong tendency to vote Democratic so there was less need to steer aid to those states.

Wright was not the only one to make this observation. Robert Fleck revisited the cross-state allocation of aid and concluded that “electoral variables do matter [in the allocation of New Deal spending] and their influence is substantial.” Disaster aid can be understood as a way to buy votes in states where the marginal voter matters for electoral success. Politicians are smart enough not to waste the opportunity to use disaster aid this way.

Gary Anderson and Robert Tollison also analyzed New Deal-era spending with an eye on congressional influences such as budget allocations and oversight. They estimated several models that included both measures of economic hardship and political influence in each state. They found that “spending went partly to the needy and partly to those with political clout.” In particular, their results showed that states with lawmakers on congressional appropriations committees received larger amounts of spending.

Jim Couch, Keith Atkinson, and William Wells took a more granular look at New Deal aid, focusing on the allocation of agricultural aid in Alabama. They documented that average spending per farmer across Alabama

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disaster declarations than uncompetitive states. Reeves also looked into the effect of declarations on voter behavior and concluded that each additional declaration led to a one percentage point bump in vote share.

The federal government also makes agricultural disaster payments to areas experiencing crop failures because of droughts, floods, or other conditions. Garrett, Thomas Marsh, and Maria Marshall analyzed agricultural disaster payments made within the 48 contiguous states between 1992 and 1999. After controlling for factors such as precipitation changes that might lead to floods or droughts, they found that states represented on relevant subcommittees of the House and Senate Agriculture committees as well as the House subcommittee overseeing agricultural appropriations received higher levels of agricultural disaster relief. The authors then used their estimation results to calculate that as much as 30% of agricultural disaster relief payments were allocated based on political influence rather than crop losses.

The analysis most pertinent to the current COVID disaster is Matt Ryan’s study of H1N1 vaccine allocations. The H1N1 (swine flu) virus spread across the United States in early 2009, but fortunately a vaccine for it was developed by late summer. The first doses were available in October 2009, but initially were in limited supply. Vaccines were distributed by the Department of Health and Human Services, and the House Committee on Energy and Commerce has oversight authority over HHS. Ryan’s results indicate that states received an additional 60,000 doses of vaccine for each additional Democratic member (the majority party in 2009) the state had on the House Energy and Commerce Committee. No such influence was found for states represented on the Senate Committee on Health, Education, Labor, and Pensions, which also has oversight over HHS.

Conclusion / To reiterate, we don’t know for certain whether Michigan or any other state has been shortchanged in the current crisis because of political favoritism. However, past findings about electorally important states suggest that, if anything, Michigan is likely to be treated well; it is expected to be an important swing state in the 2020 presidential election. However, unlike his predecessors, Trump may be more likely to let his feelings of personal offense override his political self-interest, so Michigan may indeed get shortchanged as a result of Whitmer’s criticisms of the Trump administration.

Existing research repeatedly shows that political factors influence resource allocation in disasters, so it should come as no surprise if it is ultimately determined that politics affected the response to the COVID-19 crisis. These outcomes are not the product of particular personalities or partisan affiliations, but of the incentives created by the institutional structure of politics. Politicized disaster relief is nothing more than politics as usual.

READINGS

How A Badly Drafted Sunshine Act Hobbles a Federal Agency

BY ARTHUR G. SAPPER

Sunshine acts require meetings of multimember government agencies to be open to the public. These statutes are said to embody Justice Louis Brandeis’s declaration that “sunlight … is the best disinfectant.” But as Iowa law professor Arthur Bonfield has noted, “Too much sunshine causes sunburn.” An example of this is the hobbling effect that the federal Sunshine Act has had on the Occupational Safety and Health Review Commission (OSHRC).

The OSHRC was established in 1971 as an adjudicative agency to resolve disputes over citations issued by the Occupational Safety and Health Administration. The commission is not part of the Labor Department and is wholly independent of it. The OSHRC has three members, each appointed to staggered six-years terms by the president and subject to confirmation by the Senate. It assigns administrative law judges to hear cases and, much like the certiorari procedure used by the U.S. Supreme Court, reviews their decisions on a discretionary basis.

Like any multimember adjudicative body, indeed like any appellate court, the OSHRC’s core functions have a meeting stage and an opinion-writing stage. During the latter stage, drafts of opinions are circulated and discussed, issues that previously did not loom large are more fully ventilated, and ways of writing the opinion so as to gather a majority or avoid dissents are explored. Broad holdings may be narrowed, statements may be qualified, reservations may be noted, and rationales may be sharpened or removed and others substituted. Even votes may change; dissents may become lead opinions and vice versa.

Pushing out commissioners / The Sunshine Act requires that each meeting of a quorum of members of a multimember agency be announced to the public in advance and that the public be permitted to attend. Agencies may vote to close meetings at which adjudication is to be performed, however, and the OSHRC does so as a matter of course. The problem is that the term “meeting” is so defined that each case-related visit, telephone call, and email between two commissioners triggers those requirements. As a 2013 study commissioned by the Administrative Conference of the United States (ACUS) found:

Should [agency members] wish to discuss the wording of … an opinion, as would an appellate court, the members have to notice, and vote to close, another “meeting.” … Obviously, this inefficiency is heightened in the case of … the OSHRC[,] where no two members can ever discuss agency business in private because they would constitute a quorum.

I was a staff attorney and the deputy general counsel of the OSHRC. As such, I often assisted in its deliberations, both before and after the Sunshine Act was passed in 1976. The result of the legislation on post-meeting deliberations was to push commissioners to the periphery. No longer could a commissioner visit or call another to discuss a case or draft opinion. Instead, staff counsels would be sent to do so. A former commissioner told me that the Sunshine Act thus erects an “obstacle” to deliberations and a current OSHRC employee believes that it “hamstrings a lot of agency operations and makes things difficult.” ACUS as far back as 1984 found that, because of the Sunshine Act, “the degree of collegiality in the multi-member agencies has diminished.”

But the effect is worse than that. The act undermines the very reason for having commissioners. To quote the Occupational Safety and Health Act, it is “the training, education, or experience” of the commissioners—not their staff—that justifies their nomination by the president and confirmation by the Senate. It is their names that appear on OSHRC decisions. It is they who must answer to the president for the conduct of their office. It is therefore they—not staff—who should be most directly involved in the post-meeting deliberative process, not pushed to the margins.

Journalist pushback / There is an easy fix for this problem. The 2013 ACUS-commissioned report recommended that the Sunshine Act be amended “to make clear that when an agency properly closes a meeting [as adjudicative], any subsequent meeting to discuss the same matter need not be subject to the notice and closure procedures under the Act.” But no such amendment has been made. It seems that pressure from one interest group is responsible for this: journalists. ACUS in 1997 noted that “representatives of several major press-related organizations” did not dispute that “agency members are generally reluctant to have substantive discussions in public meetings.” The representatives argued, however, that “such public officials should change their behavior and admonished them to do so.”

Arguing that human nature should change is an argument for paralysis, and so it has proved. Appellate judges deal with complex legal issues and with sensitive factual questions. They decide who should be publicly announced to have violated the law and penalized. Their decisions can set precedents for the entire nation. To ensure care is taken, they naturally feel a need for privacy so that they can speak freely. And so the law allows them to do so during agency

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meetings, with little if any complaint from the press. Admonishing them to feel differently about their need for privacy during post-meeting discussions is as vain as demanding that they hold back the wind.

But in the arena of public policy, journalists speak with a megaphone. Inasmuch as they apparently fear any re-opening of the statute, the Sunshine Act has never been substantively amended, not even to adopt the 2013 recommendation to exempt post-meeting adjudicative discussions. That a single interest group can block such a sensible and narrow amendment for such a weak reason shows yet again the wisdom of Congress in inserting sunset provisions into laws. Our government is now too complex for Congress to trust that it has drafted a law that would apply well in every detail. As the OSHRC’s experience under the Sunshine Act shows, errors in foresight—in drafting—are inevitable. If a statute were given an expiration date, the dynamic opposing change would be reversed and, when the statute comes up for extension, refinements could not be blocked easily. Interest groups who favor extension would have an incentive to compromise and settle on a refined statute that all could support. They would not be so bold as to demand that human nature be bent to their wishes.

How California’s Price-Gouging Order Can Cause More Deaths

BY RICHARD B. MCKENZIE

In response to the COVID-19 emergency, California Gov. Gavin Newsom issued orders employing the state’s anti-price-gouging law to prohibit businesses from raising prices on medical and personal protective equipment—face masks, for example—by more than 10% (plus documented cost increases) above their February 4 prices. A price increase of more than 50% (or more than 64¢ on a basic N-95 mask selling for $1.27 in early February) is deemed “unconsciously excessive” under the law and order. The penalty for “each instance in which an item is sold or offered for sale” with a price increase above 10% constitutes a “violation” subject to a fine of up to $10,000 and/or a year in jail, which suggests that the penalty can multiply with multiple sales. (There is no specified additional penalty for “unconsciously excessive” price gouging.)

Newsom seeks “fair” pricing by preventing sellers from “profiteering” on the sudden COVID-19-related jump in market demand for protective equipment. But, although his order can prevent profiteering, its rigid enforcement will limit the availability and distribution of critical supplies, thereby increasing the spread of the virus and causing more deaths.

Members of the governor’s and President Trump’s virus task forces have argued vociferously that personal protective equipment is essential to mitigating the virus’s spread, especially among frontline health care workers. Governors across the country have boosted demand by encouraging or ordering people to wear masks, with dire warnings of greater deaths if they do not.

Economists have long argued that price controls during normal times, to say nothing of emergencies, can be expected to incite hoarding by individuals, businesses, and governments, leaving store shelves bare. We are already seeing this in the current emergency and it is hardly a “fair” distributional outcome. Millions of masks (and bottles of hand sanitizer) are going unused in people’s stockpiles, unavailable to health care workers and others who may need them.

Economists also have argued that sudden market scarcities can be alleviated with price increases that induce buyers to curb purchases and—maybe more importantly—induce suppliers (new and old) to increase production.

Under normal market conditions, lowest-cost producers can be expected to dominate sales, leaving many higher-cost producers on the market sidelines because they can’t compete on price and cover costs. With price increases capped at no more than 10%, any increase in mask production will be limited to entrants with just slightly higher costs. However, with higher prices, production would be expected to expand more because the higher production costs of more entrants would be covered.

The only unknown issue is exactly how much equipment output would expand at ever-higher prices. In the immediate term, the increase might be slight to none. Time is required for existing firms to expand...
production and new (domestic and foreign) firms to enter the market, which means that production can be expected to increase with the timeframe.

The important takeaway: With unfettered market prices, more protective equipment will be available than otherwise, resulting in fewer infections and deaths. This means that the stringency of lockdown and social-distancing rules can be relaxed, which can lead to lower job and income losses. Conversely, using price-gouging controls to achieve so-called “fair” prices will give rise to more infections and more deaths than would otherwise be experienced, tempering the effectiveness of the governor’s mitigation policies.

READINGS

Will Free Markets Rise to Meet the Environmental Regulation Challenge?

BY BRUCE YANDLE

At a time when climate change is still seen by many as the most serious long-term threat facing humanity (even as the COVID-19 pandemic is foremost on our minds), leaders of the corporate and financial worlds are looking for ways to make their activities more “green.” Automakers are scrambling to shift production to all-electric vehicles and industrialists are looking for ways to reduce their corporate carbon footprints. So it’s no wonder that managers of mutual funds and bond portfolios are offering more sustainable equity and “green” bond funds. Sustainability-linked loans in the developing world are increasing rapidly.

If these trends continue and the fund managers are successful, we may someday look back at how free-market forces delivered improved worldwide environmental quality while multi-country environmental regulation seemed impossible to implement. We’ve gotten pretty good at doing things at the national, state, and local levels, but so far we haven’t found any viable solutions to the combined global effects of individual nations’ environmental use.

Consider BlackRock, the world’s largest fund manager, with some $7 trillion in various holdings. BlackRock recently announced that it will impose much stricter environmental and social standards on corporations whose shares it might consider owning. It’s also vacating investments in firms that produce coal or have large carbon footprints and expanding holdings in firms committed to fighting climate change and increasing diversity.

Along somewhat similar lines, the Wall Street Journal reports that sales of “green bonds,” which are sold to investors to fund renewable energy facilities and mass transit, rose by more than 20% last year. They are in such demand that investors are scrambling to buy them. In an effort to expand this market, the trading platform MarketAxess promised to plant five trees for every $1 million in these bonds traded. Based on last year’s $57 billion, that would yield more than 250,000 new trees.

As this unfolds, there is growing concern regarding the soft regulatory power being exerted by the nonprofit Sustainability Accounting Standards Board, which seeks to influence how corporations report social goal progress. Also, the Securities and Exchange Commission is raising questions about what qualifies an investment fund to be called “environmentally superior.” Then there is the perennial criticism of corporate social responsibility: that corporations should simply stick to their knitting and maximize shareholder value. Presumably, each day a firm’s management spends worrying about planting trees is one fewer day focused on improving products and cutting costs.

These are valid concerns. However, each one underestimates the ability of market forces to deliver what buyers will pay for and rush to bankruptcy those producers who do not. Historically, these sorts of concerns have been sorted out through a combination of give-and-take in markets and the evolution of rating services that inform investors. Committing to what consumers and investors care about doesn’t necessarily yield lower returns than does a narrow focus on products, service, and costs.

After all, if investors are truly willing to pay more for greener investments, the cost of capital will fall for the firms they favor, causing an expansion of, say, a popular tree-planting program or investment in the developing world. If buyers will pay more for green bonds, the cost of debt will fall for cities and states seeking to replace older infrastructure with cleaner technologies. And if these things begin to occur systematically, then we may one day see this market-driven environmental movement bear significant fruit.

This isn’t the time for more SEC regulation of green investments. Rather, it’s a time for independent rating organizations such as Moody, Fitch, and Standard & Poor to rise to the challenge and help verify promised outcomes, environmental and otherwise.

What we may be observing, finally, is a new day when free markets deliver cherished environmental outcomes that are proving to be exceedingly difficult for governments to achieve alone.
I pleaded guilty to a nonviolent drug offense and served my sentence, including house arrest and $1,200 in fees. But Indiana police teamed up with private lawyers to take my truck as well—a fine many times harsher than my actual sentence.

I went to the Supreme Court to make sure the Constitution protects all Americans from excessive fines and forfeitures.

And I won.

*I am IJ.*