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Risk Assessment Perspectives

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RISK ASSESSMENT PERSPECTIVES

*Peter Strauss**

I have a slightly different subtitle for our session today, which I hope our panelists may consider in addressing the many challenges before them: Cost-Benefit Analysis and Risk Assessment under Diminished Resources. Allan Morrison introduced the resource problem at the end of yesterday's session. It is an important element of the problems we face.

I think another element of those problems is finding a reasoned way of addressing these issues. The contrast between reasoned decisionmaking and political football was also nicely in evidence yesterday, perhaps especially strongly for those of us who have been responsible for putting together these presentations. In the middle of the summer, all presenters received a five-page document from Neil Eisner and Judy Kaleta, who have so energetically helped to put this wonderful program together. It gave each moderator explicit and thoughtful advice about the variety of subject matters that logically came within our particular assignments. I would call that the technocratic, reasoned, decisionmaking side of the issues. And those of us who were here yesterday experienced what often happens when carefully presented, reasonably thought-through programs encounter politics.

I imagine we can all agree on a number of propositions: Government should think before it acts. It should try to act in ways that maximize the "public good" return for the tax and private dollar investments that are required. It should use good data in making its judgments about these matters. In doing so, it should be open to dialogue with the private world—both the regulated world and the world of the regulatory beneficiary. And we probably all know, whether or not we like it, that for the foreseeable future, the government is going to have less and less money available to it for the regulatory ends it seeks; this is a fact of life that makes the premium on wise action ever the higher.

So what's the fuss about? Our problem might be discussed under a number of heads and we have a panel superbly well placed to help with the analysis. Before they start, while the crowd continues to filter in, let me spend a few minutes setting a historical framework and a taxonomy of our problems.

It might be useful to start by asking what past experience in the executive branch, in Congress, and at the agency level has taught us about the uses, limits, benefits, and risks of cost-benefit analysis and risk analysis. Our panel

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will speak to these approaches in contemporary terms, but on this almost fiftieth anniversary of the APA it is interesting to revert 21 years back to a time when Congress was considering amendments to the National Highway Traffic and Motor Vehicle Safety Act. Jim O'Reilly was just getting his law school degree then. He still had a hundred articles and 25 books in his future. (He tells me the most recent of these articles, *The Elderly, The Fall and the United States Government*, is actually a "good news" story about the government's capacity for dealing with risk.) I believe that Sylvia Lowrance, the EPA's deputy administrator for enforcement and a lawyer who has had a long career in solid waste management at EPA, was still in law school. So was Nandan Kenkeremath, now Counsel for the House Committee on Commerce and importantly connected with the proposed reform legislation. And David Hawkins had just joined the NRDC, where he now works; he has also served as a deputy administrator for the Air, Noise and Administration Division of EPA during the Carter administration.

What was bothering the nation 21 years ago was that, on our way to air bags, the National Highway Traffic Safety Administration had required ignition interlocks on automobiles, so that you couldn't start up your car unless your seat belts were fastened. It was a very cost effective means of saving lives and was not expected by the agency to be particularly problematic. Yet in 1974, in the Senate, "[m]alfunction horror stories became the order of the day."¹ I'm reading from *The Struggle for Auto Safety* by Jerry Mashaw and David Harsft, which won this Section's prize for administrative law scholarship a few years ago:

Ignition interlocks had stranded (or could strand) a motorist in the path of an oncoming train. Women were unable to flee rapists. Parking attendants, who had to buckle up no matter how short the trip, were going nuts. Housewives were buckling in their groceries. Hertz could not obtain sufficient towing services to retrieve malfunctioning vehicles. And in account after account, the family pet, usually a dog, set lights blinking, buzzers buzzing, and interlocks locking. . . .

There was merriment in the chambers. The members rocked with laughter. The United States Congress was about to enact legislation that experts told them would send seven thousand citizens each year to an early grave. [And Senator] Hartke [the sponsor of the legislation which had been subject to amendment to undo the interlock,] was both indignant and bewildered: "All the gaiety that we have heard on this floor about people who have had annoyance disappears very rapidly when you consider what we are talking about. What we are talking about here is some way to try to reduce that death toll. . . . It is a paradox."²

This was not the only measure in this bill. Another title dealt with accidents to school buses. There were a number of activist groups who were seeking safer school buses. Again, back to Mashaw and Harsft:

1. JERRY L. MASHAW & DAVID L. HARSFT, *THE STRUGGLE FOR AUTO SAFETY* 139 (1990).

2. *Id.* at 139-40 (quoting 120 CONG. REC. S30841, 30846-47 (1974)).

The activists, however, confronted a problem. NHTSA had studied the issue of school bus safety very carefully, and from a dispassionate view of the data it seemed relatively clear that the proposed amendments made no sense. Motor vehicle accidents [in 1972 and 1973 had claimed almost 110,000 lives]. . . . And 60 of the 150 fatalities . . . were adults who had the misfortune of finding themselves . . . in the path of an oncoming bus. Of the remaining 90 fatalities, moreover, 60 were children who perished *after* they had disembarked. . . . Yet the school bus amendments, ignoring 80 percent of the fatalities, did not mention pedestrian protection as one of the eight areas for mandatory rulemaking. The rules that Congress wanted NHTSA to promulgate would, therefore, only address the remaining 30 fatalities, plus some fraction of associated injuries.³

The Department of Transportation had testified at length to its rationale for taking the approach to school buses it did, which already resulted in their spending four times the amount of money per fatality prevented, as they did for ordinary automobile accidents.

This sort of careful attention to costs, benefits, and priorities was, of course, exactly what the courts, the executive branch, and Congress itself had been urging on the agency. Yet on the schoolbus issue, Representative Les Aspin apparently spoke for a majority in both houses [For those of us who don't remember who Les Aspin was, he was a liberal democrat from Wisconsin; I want to be very clear that this is not a Republican story] when he complained that "Given the comparatively low accident rates on schoolbuses, the Department of Transportation—DOT—argues that schoolbus safety regulation is an extremely low priority item. DOT maintains that in terms of a cost-benefit analysis, it is worth neither the time nor the effort of DOT to protect our school children from shoddily constructed schoolbuses. DOT is misusing the concept of cost benefit analysis."⁴

Grassroots rebellions about risk and government intervention are not new. And whether their wisdom is accurate or not is also not a new issue.

If we step back from the political side of this and try to talk about the, shall I put it, "rational" side of these problems, we can identify a series of general issues, which I hope our panelists will help to address. One of them is how regulatory efforts should be allocated across government as a whole—the problem of the regulation budget. Then, for an agency with dollars to spend, how should it choose its regulatory priorities? How much should each unit of regulatory action cost? A third set of questions is suggested by the example of the automobile and the school bus: should the principles by which we choose risks to regulate be technocratic or political. Should we look only at the raw numbers of lives that might be saved? Or shall we also look at the type of risk—accident or disease, for example, the kinds of persons to whom those risks occur, and the like. What risk comparisons are appropriate? To what extent do we take

3. *Id.* at 142 (emphasis in original).

4. *Id.* at 143 (quoting *Amendments to the National Traffic and Motor Vehicle Safety Act of 1966: Hearings on H.R. 7505, H.R. 5529, and S. 355 before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Relations*, 93d Cong., 1st Sess. 547 (1973)).

into account varying public tastes for risk—that, for example, we have a higher tolerance for risks from voluntary activities like skiing than from ones we can't control, like having a nuclear reactor located nearby. What measurements of risks should we use—mean risks or the worst case scenarios—in deciding what to deal with? Remember here that we are talking about nuclear power as well as saccharin. What should be the role for Congressional or White House politics in decisionmaking about these subjects? And how are participatory values best captured in this activity: peer review? Open records? Judicial review? If judicial review, review of what?

It should be clear that this is a very full plate of important questions, even if we could get past the political reactions that sometimes seem to play so dominant a role.