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Supplementary Materials

Part 2

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NFL Officials Constantly Face Further Review

Mark Maske, Washington Post Staff Writer
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Mike Pereira knew instantly last Sunday that the NFL had a big problem.

The league's vice president of officiating was in the command center at his office in New York, where he spends every Sunday during the season. He was surrounded by enough television screens for him and his colleagues in the officiating department to watch 10 games at once, and he saw referee Ed Hochuli botch the call in Denver that almost certainly cost the San Diego Chargers a victory and ignited a controversy that raged all week.

Like nearly everyone else watching the game, Pereira knew that Hochuli had blown the call by signaling an incomplete pass when the ball slipped from the hand of Broncos quarterback Jay Cutler. But Pereira knew more than other observers. He knew that the NFL rulebook prohibited Hochuli from overturning the erroneous call via an instant replay review. He knew plenty of people were about to be very, very agitated.

"It was one of those where you knew immediately," Pereira said in a telephone interview late in his hectic week. "I saw the play and I knew right away it was a mistake, just like Ed knew when he looked under the hood it was a mistake. The thing I knew right away because of the rule was that San Diego wasn't going to get the ball. Any time something like that happens at that point in a game, you know it's gonna be a firestorm. At that point, it becomes a matter of alerting everyone -- the commissioner, the PR staff -- what's coming."

The Hochuli call put in motion a week of apologizing and agonizing for the veteran referee and for everyone else in the officiating department. NFL representatives said Hochuli's misjudgment would affect his grade in the elaborate evaluation system the league uses for officials to determine which of them earn postseason assignments and which are retained the following season. But few outside the league know just how exacting that grading system is.

It all begins in the Sunday command center with Pereira and his cohorts stationed by screens monitoring every game. There are 10 TV feeds into the room, plus one huge screen on which Pereira can put the feed of his choosing. Every penalty called in every game is charted, along with every injury and every play that might result in a player being disciplined by the league. Pereira bounces from screen to screen when summoned by a co-worker.

"Someone might shout out to me, 'Hey, Mike, I have a roughing-the-passer in Cincinnati,' and I'll go over and look," he said. "I'll look at the replay and see if it was right. I really most likely would be able to tell you within 20 seconds if the call is correct or not.

"Really, I pretty much have a pulse on what has happened pretty much as it's happening. I want to be prepared for the coaches' calls I get Monday. I want to have a head's up. Ninety percent of the time when a coach calls me, I know what he's calling about."

Around 1 a.m. each Monday, a couple of hours after the Sunday night game is done, Pereira does a video recording for NFL Commissioner Roger Goodell with any officiating controversies from Sunday's games. He puts it on Goodell's desk around 2 a.m. so Goodell can view it when he gets to the office, just in case any angry team owners directly call the commissioner.

Each Monday, Pereira and his seven officiating supervisors gather to evaluate all of that weekend's games. They divide up the games, meaning each of them gets an average of two per week, and go through them play by play. The average game has about 153 plays. The person doing the evaluating looks at the TV shot and replays of each play and also at the coaches' tape of the play, with one thing in mind: Was it officiated correctly? If the answer to that is yes, the officiating crew gets marked for having the play correct. If not, the questions are: Who made the mistake? And why?

Each officiating crew receives a first report on the game it worked that weekend. Pereira calls this report a "project." There are notes and thoughts on individual plays. He read a few notes from Monday night's Eagles-Cowboys game as examples. On one first-quarter play, an official called holding but the report said: "When you look at it on the coaching tape, it just doesn't seem strong enough."

Each official is given a chance to respond on any call alleged to have been wrong. Then each Wednesday, Pereira and his supervisors meet and go over each of those calls. The group is told what the report says and what the official's response was. Sometimes the official agrees that a mistake was made; sometimes not. The play is shown and a vote is taken on whether an error was made. Majority rules. In the case of a 4-4 tie, the official gets the benefit of the doubt and no mistake is charged.

The gaffes are tallied. A failure to call a penalty that should have been called is a six-point deduction. Calling a penalty that wasn't a penalty is a 10-point deduction. An incorrect judgment is a deduction of anywhere from six to 10 points, depending on the severity. A perfect score would be 100.

"I haven't seen too many of those," Pereira said. "It happens sometimes, but not very often."

Each individual official gets a grade, and the officiating crew as a whole gets a grade. A computer printout with all the grades comes out late Wednesday, and they're distributed.

At the end of the season, the grades are added up and the eight highest-ranking officiating crews qualify for the first two rounds of the playoffs. Those crews stay intact to work the first two weekends of the postseason. The final two rounds of the postseason, the conference championship games and the Super Bowl, are worked by mixed crews consisting of the highest-ranked officials at each position. (There also is an experience requirement; rookies can't work the playoffs and it takes five years to be eligible for the Super Bowl.)

At the other end of the spectrum, the grades also determine which officials are in danger of being dismissed. The league sets what it regards as a minimum standard, and any official whose grade for the season falls below that standard is put on probation. If the same official misses the standard for a second straight season, he's in jeopardy of being dismissed. The average annual turnover, including retirements, is about six officials, Pereira said. After last season, it was seven.

An officiating crew is graded on about 2,200 plays per season. Hochuli botched one. But it was a memorable one, and an uproar followed. Hochuli reportedly was deluged with hate mail and responded with e-mailed apologies. With a few exceptions, officials are prohibited from speaking to the media. The NFL Referees Association came to his defense, issuing a statement of support. The Chargers were left with an 0-2 record after the 39-38 defeat and did their best to move on.

"Anything that we talk about or anything that is discussed in terms of any of the rules or any of the calls isn't going to change the outcome of that game," their coach, Norv Turner, said at a news conference. "That game is going to be 39-38 forever."

The NFL's competition committee likely will review the play in the offseason and might

consider changing the rule that prohibited Hochuli from awarding the ball to the Chargers after viewing the replay. The league changed its rule in early 2007 to allow possession to be awarded to the defense when it recovers a fumble on a play on which it originally was ruled, wrongly, that the offensive player was down by contact before fumbling and the whistle was blown.

"It's going to require a great deal of discussion," Tennessee Titans Coach Jeff Fisher, a co-chairman of the competition committee, said at a news conference.

But a former member of the committee, Charley Casserly, said he doesn't see the rule being changed.

"He was definitive in his call," Casserly, the former general manager of the Washington Redskins and Houston Texans, said in a telephone interview. "The whistle is blown, and some players are gonna stop playing. It's dramatically different than a down-by-contact call where everything happens in a close proximity. In this narrow set of circumstances, I don't see a solution to it. The call was missed. Sometimes calls get missed. It's not fair. This one got talked about a little more, but calls get missed every week."

Pereira will be back in his office today, watching all those TV screens to see which calls are right and which aren't and hoping that another major controversy isn't ignited.

"Everyone felt horrible," Pereira said. "Ed felt horrible. It's a mistake, and we don't want to make mistakes. We strive for perfection. You don't get there very often. If I had to be perfect in my job, I wouldn't last here a day. But that's the goal."

Statutory Background for *National Petroleum Refiners Ass'n v. FTC*

Trade Commission Act

§ 5 (15 U.S.C. § 45). Unfair methods of competition unlawful; prevention by Commission--Declaration of unlawfulness; power to prohibit unfair practices.

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * *

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in [an appropriate] court of appeals of the United States * * * .

* * *

§ 6 (15 U.S.C. § 46): Additional powers of Commission.

The Commission shall also have power-

(a) Investigation of corporations.

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) Reports by corporations.

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or

special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission.

(c) Investigation of compliance with antitrust decrees.

Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the Commission.

(d) Investigations of violations of antitrust statutes.

Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Readjustment of business of corporations violating antitrust statutes.

Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) Publication of information; reports.

To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) Classification of corporations; regulations.

From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.

(h) Investigations of foreign trade conditions; reports.

To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Notes and Questions

According to the court in *Petroleum Refiners*, which provision of this statute authorized the agency to promulgate the rule at issue? Looking at that provision in the context of the entire statute, what do you think it means?

Regulatory Background for *Heckler v. Campbell:* Sample HHS Residual Functional Capacity Table

Table No. 1—Residual Functional Capacity: Maximum Sustained Work Capability Limited to Sedentary Work as a Result of Severe Medically Determinable Impairment(s)

Rule	Age	Education	Previous Work Experience	Decision
201.01	Advanced age	Limited or less.	Unskilled or none.	Disabled
201.02	do. [short for "ditto"]	do.	Skilled or semiskilled—skills not transferrable.	do.
201.03	do.	do.	Skilled or semiskilled—skills transferable.	Not disabled.
201.04	do.	High school graduate or more—does not provide for direct entry into skilled work.	Unskilled or none.	Disabled.
201.05	do.	High school graduate or more—provides for direct entry into skilled work.	do.	Not disabled.
201.06	do.	High school graduate or more—does not provide for direct entry into skilled work.	Skilled or semiskilled—skills not transferrable.	Disabled.
201.07	do.	do.	Skilled or semiskilled—skills transferable.	Not disabled.
201.08	do.	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferrable.	do.
201.09	Closely approaching advanced age.	Limited or less	Unskilled or none.	Disabled.
201.10	do.	do.	Skilled or semiskilled—skills not transferrable.	do.
201.11	do.	do.	Skilled or semiskilled—skills transferable.	Not disabled.
201.12	do.	High school graduate or more—does not provide for direct entry into skilled work.	Unskilled or none.	Disabled.
201.13	do.	High school graduate or more—provides for direct entry into skilled work.	do.	Not disabled.
201.14	do.	High school graduate or more—does not provide for direct entry into skilled work.	Skilled or semiskilled—skills not transferrable.	Disabled.
201.15	do.	do.	Skilled or semiskilled—skills transferable.	Not disabled.
201.16	do.	High school graduate or more—provides for direct entry into skilled work.	Skilled or semiskilled—skills not transferrable	Do.
201.17	Younger individual age 45-49	Illiterate or unable to communicate in English.	Unskilled or none.	Disabled.
201.18	do.	Limited or less—at least literate and able to communicate in English	do.	Not disabled.
201.19	do.	Limited or less	Skilled or semiskilled—skills not transferrable.	Do.
201.20	do.	do.	Skilled or semiskilled—skills transferable.	Do.
201.21	do.	High school graduate or more	Skilled or semiskilled—skills not transferrable.	Do.
201.22	do.	do.	Skilled or semiskilled—skills transferable.	Do.
201.23	Younger individual age 18-44	Illiterate or unable to communicate in English	Unskilled or none.	Do.
201.24	do.	Limited or less—at least literate and able to communicate in English	do.	Do.
201.25	do.	Limited or less	Skilled or semiskilled—skills not transferrable.	Do.
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42 U.S.C. § 405(b)(1) provides in part:

> The Commissioner of Social Security is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Any such decision by the Commissioner of Social Security which involves a determination of disability and which is in whole or in part unfavorable to such individual shall contain a statement of the case, in understandable language, setting forth a discussion of the evidence, and stating the Commissioner's determination and the reason or reasons upon which it is based. Upon request by any such individual * * * the Commissioner shall give such applicant * * * reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse the Commissioner's findings of fact and such decision.

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Additional Excerpt from *Sierra Club v. Costle*

The following excerpt goes in the first ellipsis on casebook p. 616 (near the top). It deals with a claim by the Environmental Defense Fund (EDF) that the agency improperly accepted and considered comments that were submitted after the close of the public comment period:

Written Comments Submitted During Post-Comment Period

Although no express authority to admit post-comment documents exists, the statute does provide that:

> All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

This provision, in contrast to others in the same subparagraph, is not limited to the comment period. Apparently it allows EPA not only to put documents into the record after the comment period is over, but also to define which documents are "of central relevance" so as to require that they be placed in the docket. The principal purpose of the drafters was to define in advance, for the benefit of reviewing courts, the record upon which EPA would rely in defending the rule it finally adopted; it was not their purpose to guarantee that every piece of paper or phone call related to the rule which was received by EPA during the post-comment period be included in the docket. EPA thus has authority to place post-comment documents into the docket, but it need not do so in all instances.

Such a reading of the statute accords well with the realities of Washington administrative policymaking, where rumors, leaks, and overreactions by concerned groups abound, particularly as the time for promulgation draws near. In a proceeding such as this, one of vital concern to so many interests industry, environmental groups, as well as Congress and the Administration it would be unrealistic to think there would not naturally be attempts on all sides to stay in contact with EPA right up to the moment the final rule is promulgated. The drafters of the 1977 Amendments were practical people, well versed in such activity, and we decline now to infer from their silence that they intended to prohibit the lodging of documents with the agency at any time prior to promulgation. Common sense, after all, must play a part in our interpretation of these statutory procedures.

EPA of course could have extended, or reopened, the comment period after January 15 in order formally to accommodate the flood of new documents; it has done so in other cases. But under the circumstances of this case, we do not find that it was necessary for EPA to reopen the formal comment period. In the first place, the comment period lasted over four months, and although the length of the comment period was not specified in the 1977 Amendments, the statute did put a premium on

speedy decisionmaking by setting a one year deadline from the Amendments' enactment to the rules' promulgation. EPA failed to meet that deadline, and subsequently entered into a consent decree where it promised to adopt the final rules by March 19, 1979, over seven months late. EPA also failed to meet that deadline, and it was once more extended until June 1, 1979 upon agreement of the parties pursuant to court order. Reopening the formal comment period in the late spring of 1979 would have confronted the agency with a possible violation of the court order, and would further have frustrated the Congressional intent that these rules be promulgated expeditiously.

If, however, documents of central importance upon which EPA intended to rely had been entered on the docket too late for any meaningful public comment prior to promulgation, then both the structure and spirit of section 307 would have been violated. The Congressional drafters, after all, intended to provide "thorough and careful procedural safeguards ... (to) insure an effective opportunity for public participation in the rulemaking process." Indeed the Administrator is obligated by the statute to convene a proceeding to reconsider the rule where an objection of central importance to it is proffered, and the basis of the objection arose after the comment period had closed. Thus we do not hold that there are no circumstances in which reopening the comment period would ever be required.

The case before us, however, does not present an instance where documents vital to EPA's support for its rule were submitted so late as to preclude any effective public comment. The vast majority of the written comments referred to earlier . . . were submitted in ample time to afford an opportunity for response. Regarding those documents submitted closer to the promulgation date, our review does not reveal that they played any significant role in the agency's support for the rule. The decisive point, however, is that EDF itself has failed to show us any particular document or documents to which it lacked an opportunity to respond, and which also were vital to EPA's support for the rule.

Additional Excerpt from Association of National Advertisers v. FTC

The following excerpt goes at the end of the majority opinion at HPW 628:

The appellees have a right to a fair and open proceeding; that right includes access to an impartial decisionmaker. Impartial, however, does not mean uninformed, unthinking, or inarticulate. The requirements of due process clearly recognize the necessity for rulemakers to formulate policy in a manner similar to legislative action. The standard enunicated today will protect the purposes of a section 18 proceeding, and, in so doing, will guarantee the appellees a fair hearing.

We would eviscerate the proper evolution of policymaking were we to disqualify every administrator who has opinions on the correct course of his agency's future action. Administrators, and even judges, may hold policy views on questions of law prior to participating in a proceeding. The factual basis for a rulemaking is so closely intertwined with policy judgments that we would obliterate rulemaking were we to equate a statement on an issue of legislative fact with unconstitutional prejudgment. The importance and legitimacy of rulemaking procedures are too well established to deny administrators such a fundamental tool.

Finally, we eschew formulation of a disqualification standard that impinges upon the political process. An administrator's presence within an agency reflects the political judgment of the President and Senate. As Judge Prettyman of this court aptly noted, a "Commission's view of what is best in the public interest may change from time to time. Commissions themselves change, underlying philosophies differ, and experience often dictates changes." . . . We are concerned that implementation of the *Cinderella* standard in the rulemaking context would plunge courts into the midst of political battles concerning the proper formulation of administrative policy. We serve as guarantors of statutory and constitutional rights, but not as arbiters of the political process. Accordingly, we will not order the disqualification of a rulemaker absent the most compelling proof that he is unable to carry out his duties in a constitutionally permissible manner.

Reversed.