

Transatlantic Law Forum
“The Rule of Law and the Administrative State in Crisis”
George Mason Law School/Law & Economics Center
Council on Public Policy
February 15-16, 2013
Arlington, VA

The Transatlantic Law Forum (TLF) will host its Sixth Annual Conference on February 15-16, 2013 at George Mason Law School in Arlington, Virginia. The topic of the conference is “The Rule of Law and the Administrative State in Crisis.”

Conference Description

Liberal democracies expect that public administration and government regulation will conform to rule-of-law norms and values, including legality, regularity, predictability, transparency, and accountability. Of late, and especially in the wake of an international fiscal and financial crisis that is well into its fifth year, public institutions that are expected to abide by those standards have come under acute stress and, to many minds, have often failed to live up to reasonable norms of lawful government. In the United States, massive reforms of financial industries and of the health care and insurance sectors have taken the form 1,000-page enactments of highly uncertain content and consequence. On the other side of the Atlantic, the European Union is attempting to stick-build a “fiscal union” through a series of awkward political bargains, outside and arguably in contravention of the EU’s treaty framework.

What lies behind this outbreak of institutional improvisation, in derogation of rule-of-law forms as they have been traditionally understood? Is it a response to intense but temporary fiscal and political stress, or a “new normal”? Do contemporary democratic demands and perceived imperatives exceed the capacity of administrative agencies and independent institutions within their traditional bounds?

At the TLF conference, prominent experts from the United States and Europe will discuss these and related questions that will benefit from a candid, informed transatlantic dialogue and examination. The conference program that follows contains information on the conference schedule, panel topics, and speakers.

The conference, like several earlier TLF events, is co-sponsored by the Federalist Society.

About the Transatlantic Law Forum

The TLF is a joint venture between the Law & Economics Center at George Mason Law School in Arlington, VA and the Council on Public Policy (CPP) in Bayreuth, Germany. It is co-directed by Michael S. Greve (GMU Law School) and Michael Zöller (President, CPP). The TLF aims to create a transatlantic community of lawyers, judges, policymakers, scholars and journalists with an abiding interest in questions of constitutionalism and constitutional government. To that end, the TLF hosts annual, high-level conferences on political, social and economic issues with salient—though often underestimated—constitutional dimensions.

The TLF's events feature prominent lawyers, judges and scholars from both sides of the Atlantic. Conferences alternate between George Mason Law School and Bucerius Law School in Hamburg, Germany.

Conference Program

Friday, February 15

8:00 – 8:45

Breakfast

Registration

8:45

Welcoming Remarks

Dan Polsby (Dean, GMU Law School)

Henry Butler (Director, Law & Economics Center)

9:00 – 10:30

Panel 1: A Law of Rules—or Bargains?

Can modern democracies and economies still be steered through formal rules, or are political or economic bargains within intergovernmental “networks” and with private (regulated) parties the only plausible means of translating democratic decisions into administrative practice? Should we re-think our formalist ideals? Our political institutions? Both?

Moderator: Michael Greve (GMU Law School)

Panelists: Alberto Mingardi (Istituto Bruno Leoni)

Ashley Parrish (King & Spalding)

Christian Kirchner (St. Gallen)

Philip Wallach (Brookings Institution)

10:45 - 12:15

Panel 2: The Future of Administrative Law

One can make a plausible case that the administrative law systems—in European countries, in the U.S., and in the EU—have fallen behind the times. Each has done so for somewhat different reasons and in different respects, but they all seem incapable of ordering (let alone checking) administrative conduct in its new, bewildering multiplicity of forms. Is that right? What would an administrative law for this day and age look like?

Moderator: Judge Stephen Williams (U.S. Court of Appeals, D.C. Circuit)

Panelists: Francesca Bignami (George Washington Law School)

Stavros Gadinis (Boalt Hall Law School)

Robert R. Gasaway (Kirkland & Ellis)

Nathan Sales (GMU Law School)

12:30 – 1:30

Luncheon Address

Friedrich Merz (President, Atlantik-Bruecke; Mayer Brown LLP, Berlin)

1:45 – 3:15

Panel 3: Financial Oversight: United States

In the aftermath of the financial crisis, the regulatory framework in the United States underwent a dramatic reform. The Dodd-Frank Act created new regulatory bodies that combine formidable powers with poorly defined statutory mandates. By some estimates, the agencies are charged with issuing over 400 new rules and regulations in a very short time. What challenges has this regime posed in terms of legal certainty, regularity, transparency, and political accountability? How have the agencies coped with those challenges?

Moderator: Alex Pollock (American Enterprise Institute)

Panelists: Paul Atkins (American Enterprise Institute)
Roberta Romano (Yale Law School)
Alastair Sutton (Sutton European Legal Services)
J.W. Verret (GMU Law School)

3:30 – 5:00

Panel 4: Financial Oversight: Europe

As part of a move toward a true “Fiscal Union,” the EU is contemplating the creation of an EU (euro-zone)-wide financial supervisory structure. Strikingly, this discussion appears to be set in the context of the EU’s intergovernmental crisis management mode (*i.e.*, near-permanent summits); the EU’s ordinary regulatory bodies appear to have been sidelined. Who is actually going to create a new structure? What makes us think that it would be a credible *regulatory* body, as opposed to a slightly regularized form and instrument of prime-ministerial negotiation?

Moderator: C. Boyden Gray (Boyden Gray & Associates) [*invited*]

Panelists: Kenneth Dam (University of Chicago)
Jean-Claude Gruffat (Citibank)
Claus Tiggens (Deutsche Bundesbank)
Takis Tridimas (London School of Economics)

6:30

Dinner [*location TBA*]

Introduction: Leonard Leo (Federalist Society)

Keynote Address: Christopher DeMuth (Hudson Institute)

Saturday, February 16

8:30—10:15

Panel 5: Bankruptcies, Workouts, and Cramdowns

In response to the financial crisis, orderly bankruptcy processes—where they exist—have often been set aside; General Motors and comparable European cases come readily to mind. For *sovereign* defaults, regularized standards and procedures have been especially hard to come by—among other reasons, because they invariably involve difficult trade-offs between the *legal* demands of creditors, employees, and retirees on the one hand and the *democratic* demands of citizens who naturally oppose solutions that would commit future tax payments to creditors rather than public services. How have political and judicial institutions responded to those conflicting demands?

Moderator: Christian von Sydow (McDermott Will & Emery Rechtsanwaelte Steuerberater LLP)

Panelists: Horst Eidenmueller (University of Munich)
Adam Lerrick (American Enterprise Institute)
Todd Zywicki (GMU Law School)

10:30 – 12:00

Panel 6: Constitutional Courts

In 2012, two of the most powerful constitutional courts in the world decided cases that implicated the basic principles of their respective constitutional orders. In June, the U.S. Supreme Court decided *NFIB v. Sebelius*, arising over the Affordable Care Act (“Obamacare”). In September, Germany’s Federal Constitutional Court issued a preliminary ruling in the case over the European Stability Fund and the EU’s Fiscal Pact. What do these cases tell us about the ability of constitutional courts to maintain structural limitations—as opposed to rights protections—on political institutions?

Moderator: Judge Douglas Ginsburg (U.S. Court of Appeals, D.C. Circuit)

Panelists: Erin Delaney (Northwestern University Law School)
Katja Gelinsky (Konrad Adenauer Foundation)
Russell Miller (Washington & Lee Law School)
Krassen Stanchev (Institute for Market Economics)

12:15 – 2:00

Luncheon Panel: Institutions, Boundaries, and Political Stability

Institutions, governed by rules of law, are expected to produce stability and certainty—to “reduce complexity”—both over time and in a functional sense. Across time, institutions serve to generate and protect stable expectations and patterns of public and private conduct. Functionally, institutions operate within political, territorial, and legal boundaries that cabin their reach and responsibilities. We draw occasionally artificial boundaries (*e.g.*, between monetary and fiscal policy, or between energy policy and environmental protection) despite and, in a sense, because of the complexity of our society and economy: the world cannot be managed as a global commons.

Or so, most of us have been taught. Lately, however, there have been calls for a more integrated, comprehensive approach to politics and political institutions—lest we leave the fate of liberal democracy to anarchic bond markets and reckless speculators. Is that agenda for a “self-empowerment of politics” (Juergen Habermas) plausible? Is it controllable within the forms and formalities of the rule of law, as traditionally understood? Do constitutional democracies need an alternative agenda—and if so, what would it look like?

Moderator: Michael Zoeller (Council on Public Policy)

Panelists: Karl-Heinz Ladeur (Universitaet Hamburg, School of Law)
Daniel Johnson (Standpoint) [*invited*]
R. Shep Melnick (Boston College)
Jeremy Rabkin (GMU Law School)

2:00 – 2:15

Concluding Remarks; Adjournment