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Arnold Rochvarg
University of Baltimore School of Law, arochvarg@ubalt.edu

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ARTICLE

HOW ADMINISTRATIVE LAW HALTED THE DEATH PENALTY IN MARYLAND

By: Arnold Rochvarg*

Over the years, various arguments have been made to challenge death sentences given to convicted criminal defendants.[1] These arguments have primarily been based on constitutional claims involving ineffective assistance of counsel,[2] equal protection,[3] right to trial by jury,[4] and cruel and unusual punishment.[5] Constitutional Criminal Law arguments were again raised in the recent Maryland case, *Evans v. Maryland*,[6] which sought to overturn the death sentence of a hired killer who had been convicted of two counts of first degree murder.[7] None of these arguments were successful. An Administrative Law argument, however, was successful not only in stopping the execution of Evans, but also in halting the death penalty in Maryland.[8]

The Administrative Law argument that was successful in *Evans* was based on the statutory procedures which must be followed in order for an administrative agency to adopt a valid, legally binding regulation.[9] This argument is of recent vintage in Administrative Law litigation, and it appears to have had its first application to the death penalty in *Evans*. This Administrative Law argument has the potential for wide application, and is another reminder why it is so important for all lawyers, regardless of what area of law they practice, to understand the principles of Administrative Law.

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* Professor, University of Baltimore School of Law. Author of MARYLAND ADMINISTRATIVE LAW (MICPEL 2d ed. 2007).

1. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Woodson v. North Carolina, 428 U.S. 280 (1976); Furman v. Georgia, 408 U.S. 238 (1972); Oken v. Maryland, 378 Md. 179, 835 A.2d 1105 (2003), *cert. denied*, 541 U.S. 1017 (2004).
2. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510 (2003).
3. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).
4. *See, e.g.*, Ring v. Arizona, 536 U.S. 584 (2002).
5. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976).
6. 396 Md. 256, 914 A.2d 25 (2006).
7. *Id.* at 269-70, 914 A.2d at 33.
8. *Evans*, 396 Md. 256, 914 A.2d 25.
9. *See generally* ARNOLD ROCHVARG, MARYLAND ADMINISTRATIVE LAW, § 5.1 (MICPEL 2d ed. 2007).

In 1983, Vernon Evans ("Evans") was paid $9,000 to kill a husband and wife who were both potential witnesses in an upcoming federal criminal case.[10] Evans killed the husband and another woman whom Evans mistakenly believed was the woman he had been hired to kill.[11] In 1984, Evans was convicted of two counts of first-degree murder and sentenced to death.[12] The convictions and sentence were originally affirmed on appeal,[13] but in 1991, a post-conviction proceeding resulted in a new sentencing hearing.[14] After this new sentencing hearing, a second jury also sentenced Evans to death.[15] The recent opinion by the Court of Appeals of Maryland concerned this second death sentence.

Capital punishment was accomplished in Maryland, until 1955, by hanging.[16] In 1955, legislation was enacted which ended death by hanging and replaced it with death by lethal gas.[17] The gas chamber was regarded by the legislature at that time to be "less painful and more dignified than hanging or electrocution."[18] By 1993, Maryland was the only state that used lethal gas for capital punishment.[19] A "Governor's Commission on the Death Penalty" in 1993 recommended that lethal injection be substituted for the gas chamber as the sole method of execution in Maryland.[20] In 1994, legislation was enacted and codified in Title 3, section 3-905(a) of the Correctional Services Act.[21] This section provides: "the manner of inflicting the punishment of death shall be the continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate or other similar drug in combination with a chemical paralytic agent until a licensed physician pronounces death according to accepted standards of medical practice."[22] In response to this legislation, the Department of Corrections (DOC) adopted an "Execution Operations Manual"

10. *Evans*, 396 Md. at 269, 914 A.2d at 33.
11. *Id.*
12. *Id.* at 269-70, 914 A.2d at 33.
13. *Id.* at 270, 914 A.2d at 33 (respectively referring to Evans v. State, 382 Md. 248, 855 A.2d 291 (2004); Evans v. State, 304 Md. 487, 499 A.2d 1261 (1985)).
14. *Id.* at 270, 914 A.2d at 33.
15. *Id.*
16. *Id.* at 342, 914 A.2d at 76 (discussing the Report of the Governor's Commission on the Death Penalty).
17. *Id.*
18. *Id.*
19. *Id.* (citing the Report of the Governor's Commission on the Death Penalty at 215).
20. *Id.*
21. MD. CODE ANN. CORR. SERVS. § 3-905(a) (1999).
22. *Id.*

("EOM") which sets forth the details of how the execution should be implemented.[23] The EOM includes topics such as the responsibilities of DOC personnel, pre-execution procedures, security for inmates awaiting executions, and a "Lethal Injection Checklist" which sets forth the contents of the lethal injection and the method of injecting it.[24]

I. ARGUMENTS RAISED IN *EVANS*

In an earlier death penalty case, *Oken v. Maryland*,[25] the Court of Appeals of Maryland held that Maryland's method of execution by lethal injection did not constitute cruel or unusual punishment.[26] This issue was not central to Evans' appeal.[27] Rather, Evans made the following five arguments to overturn his death sentence:[28]

(1) A new sentencing hearing was required because Evans' attorneys at the second sentencing hearing failed to investigate and present mitigating evidence relating to his background. This constituted prejudicial, ineffective assistance of counsel under *Wiggins v. Smith*[29] and *Rompilla v. Beard*.[30]

(2) Under the holding of *Miller-El v. Dretke*,[31] a new trial on Evans' guilt was required because the prosecution in the selection of the jury at the 1984 trial had exercised its peremptory strikes in a racially discriminatory manner.

(3) The death sentence imposed on Evans was unconstitutional because of selective prosecution by the Baltimore County State's Attorney's Office based on racial and geographic discrimination.

(4) The EOM, which sets forth the details of the implementation of the death penalty by lethal injection, conflicted with the statute which adopted lethal injection as Maryland's method of capital punishment.

(5) The EOM was invalid and thus could not be the basis of any execution by lethal injection because the EOM was a "regulation"

23. *Evans*, 396 Md. at 337, 914 A.2d at 73.
24. For discussion of some of the details of execution, see *id.* at 338, 914 A.2d at 73.
25. 378 Md. 179, 835 A.2d 1105 (2003).
26. *Id.* at 269, 835 A.2d at 1157.
27. *Evans*, 396 Md. at 328 n.13, 914 A.2d at 67 n.13 ("We shall . . . regard any cruel and unusual punishment claim as having been knowingly and voluntarily waived with respect to the appeal.").
28. *Id.* at 269-71, 914 A.2d at 33-34.
29. 539 U.S. 510, 534-35 (2003).
30. 545 U.S. 374, 388-93 (2005).
31. *See* 545 U.S. 231 (2005).

within the definition of the Maryland Administrative Procedure Act (APA). The EOM had not been adopted in compliance with the APA procedural requirements for the adoption of a regulation.

The Court of Appeals of Maryland rejected Evans' first four arguments, but granted relief on the fifth argument.[32] The Court agreed that the EOM was a regulation that had never been properly adopted under the APA.[33] This holding required an injunction against the carrying out of any death sentence by lethal injection in Maryland, including the death sentence imposed on Evans.[34]

The vast majority of the Court's opinion is concerned with the arguments involving ineffective assistance of counsel and racial discrimination.[35] These arguments, which have been raised in other death penalty cases, were rejected by the majority of the Court after a detailed, careful analysis. These Constitutional Criminal Law arguments have been extensively discussed by numerous commentators,[36] and this article is not concerned with them. The winning argument for Evans (and all death penalty opponents) - the Administrative Law procedure argument - had not been raised in any death penalty appeal prior to *Evans*. The Court's analysis of this issue is relatively short, straightforward and simple. As discussed in this article, the Court of Appeals of Maryland was clearly correct in its conclusion on this issue.

II. APA RULEMAKING REQUIREMENTS

The APA defines the term "regulation" as a statement that has general application, future effect and is adopted by an agency to detail or carry out a law that the agency administers or which governs the agency's organization, procedure or practice.[37] The label placed on the statement by the agency does not control whether the statement is a regulation. Something is a regulation even if the agency calls it a guideline, a standard, a statement of policy, a directive, an interpretation or anything else if it satisfies the definition of regulation

32. *Evans*, 396 Md. at 271, 914 A.2d at 34.
33. *Id.*
34. *Id.* at 256, 914 A.2d at 80-81.
35. *See generally id.*
36 A Westlaw search of law review articles on "death penalty," "capital punishment," and "constitutional attack," indicates that there have been over 20,000 articles discussing the issue. http://www.westlaw.com (last visited Mar. 18, 2007).
37. MD. CODE ANN., STATE GOV'T § 10-101(g)(1) (2004 & Supp. 2006) [hereinafter STATE GOV'T §__].

set forth in the APA.[38] The only statement that meets the definition of regulation, but is not treated as a regulation under the Maryland APA, is a statement that "concerns only the internal management" of the agency and "does not affect directly the rights of the public or the procedures available to the public."[39]

The major significance to whether something is a regulation is that in order for an agency to base its action on a regulation, the regulation must have been adopted by the agency pursuant to the procedural requirements for adoption of regulations as set forth in the APA. These procedures include prior review and approval by the Attorney General,[40] review and approval by a joint committee of the House of Delegates and the Senate known as the Joint Committee on Administrative, Executive, and Legislative Review ("AELR Committee"), [41] and publication of a notice of proposed adoption of the regulation in the Maryland Register.[42] This published notice must include "the estimated economic impact of the proposed regulation on the revenues and expenditures" of agencies of the state and local governments, and upon consumers, businesses, industries, taxpayers, and trade groups.[43] The published notice of proposed adoption of a regulation must also set forth the "date, time, and place for a public hearing at which oral or written views and information" can be submitted to the agency either in support of or in opposition to the proposed regulation.[44] If the agency wants to adopt a proposed regulation that has been opposed by the AELR Committee, the proposed regulation is submitted to the Governor who has the ultimate power to order the agency to withdraw it, modify it or adopt it.[45] If adopted, a notice of adoption is published in the Maryland Register.[46] A regulation, as defined by the APA, cannot be relied upon by an agency if the above described procedures have not been followed, unless the agency can establish that what is being challenged concerns

38. *See* Massey v. Sec'y, Dep't of Pub. Safety & Corr. Servs., 389 Md. 496, 527, 886 A.2d 585, 603 (2005) (Bell, J., concurring and dissenting).
39. STATE GOV'T § 10-101(g)(2)(i).
40. STATE GOV'T § 10-107(b).
41. STATE GOV'T § 10-101(c).
42. STATE GOV'T § 10-112(a)(2).
43. STATE GOV'T § 10-112(a)(3)(i).
44. STATE GOV'T § 10-112(a)(3)(v).
45. STATE GOV'T § 10-111.1(c).
46. STATE GOV'T § 10-114(a) (Supp. 2006).

only the internal management of the agency and does not affect directly the rights of the public.[47]

III. MARYLAND CASES DISCUSSING WHETHER "SOMETHING" IS A REGULATION

The significance of the Maryland APA's definition of regulation seems to have been only recently recognized by Maryland courts. The first Court of Appeals of Maryland decision addressing the argument that an agency statement was a regulation, and was invalid because it had not been adopted pursuant to the required APA procedures, was not until 1996. That opinion did not rely on the APA definition of regulation in reaching its conclusion. The case, *Department of Health & Mental Hygiene v. Chimes,*[48] upheld the agency's decision to impose a cap on the growth of the amount payable to reimburse providers of services to persons with developmental disabilities.[49] This growth cap had been adopted by the agency without following the APA procedures for a regulation.[50] In response to the procedural challenge to the growth cap, the Court of Appeals of Maryland upheld the growth cap.[51] The Court relied upon the following grounds for its holding:

1. the growth cap did not have widespread application;
2. the growth cap did not change existing law;
3. the growth cap did not apply retroactively;
4. the agency had a strong interest in adopting a cost containment policy as quickly as possible.[52]

In 2001, the First Edition of my book *Maryland Administrative Law*[53] was published. In that edition, I criticized the *Chimes* opinion, and called it "not useful" because its holding was not based on the Maryland APA's definition of regulation.[54] I wrote at that time that the issue in *Chimes* should have been decided "solely on the definition of regulation as it appears in the APA."[55]

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47. STATE GOV'T § 10-101(g)(2)(i).
48. 343 Md. 336, 681 A.2d 484 (1996).
49. *Id.* at 347-48, 681 A.2d at 489.
50. *Id.* at 342-43, 681 A.2d at 487.
51. *Id.* at 347-48, 681 A.2d at 489.
52. *Id.* at 346-47, 681 A.2d at 489.
53. ARNOLD ROCHVARG, MARYLAND ADMINISTRATIVE LAW (MICPEL 1st ed. 2001).
54. *Id.* § 2.2, at 8-10.
55. *Id.* § 2.2, at 10.

In 2002, the Court of Appeals of Maryland decided *Delmarva Power & Light Co. v. Public Service Commission*.[56] The Public Service Commission (PSC) had adopted "standards" that governed issues arising from the diversification and expansion of business activities by regulated utilities into areas of non-regulated business activities.[57] For example, the standards prohibited joint advertising, joint sales calls and joint office locations between a utility and a non-regulated affiliate.[58] These standards had the most immediate application to the utility Baltimore Gas & Electric Co. and its affiliate, BGE Home, but the standards applied to all utilities.[59] Several utilities challenged these standards because they believed these standards were regulations that had been adopted without following the APA procedures for the adoption of regulations.[60] The Court of Appeals of Maryland in *Delmarva* unanimously ruled, based on the APA definition of regulation, that the PSC standards were regulations and therefore invalid.[61] The opinion stated that the PSC standards had general application to all utilities and their affiliates, they had future effect and they carried out the laws that the PSC administers.[62] This 2002 opinion in *Delmarva* is the first case where the APA definition of regulation had been relied upon to invalidate an agency's action.

IV. IMPACT OF *DELMARVA*

After *Delmarva* was decided, I spoke at several continuing legal education programs for lawyers and judges. I expressed my opinion that *Delmarva* was a very important decision that could have great impact. Lawyers had told me of "regulations" lurking within agencies masquerading as guidelines, policies, directives, bulletins, memos, standards, guidances, etc. None had been adopted according to the APA requirements for a regulation. My opinion was that they were all invalid.

In 2004, I agreed to serve as pro bono counsel on behalf of mentally retarded residents of the Rosewood Center, a State residential center in Owings Mills operated by the Developmental Disabilities Administration (DDA), an agency within the Department of Health

56. 370 Md. 1, 803 A.2d 460 (2002).
57. *Id.* at 10-17, 803 A.2d at 465-69.
58. *Id.* at 18-19, 803 A.2d at 470.
59. *Id.* at 21-22, 803 A.2d at 472.
60. *Id.* at 17, 803 A.2d at 469.
61. *Id.* at 4, 803 A.2d at 462.
62. *Id.* at 26, 803 A.2d at 474.

and Mental Hygiene (DHMH). A plan had been devised by the DDA to transfer some Rosewood Center residents to the Clifton T. Perkins Hospital Center, a state psychiatric hospital. The decision as to which Rosewood Center residents would be transferred was based in part on "Rosewood Center Policy Number 152" which created a Forensic Review Board to make decisions regarding Rosewood residents. Policy Number 152 had been adopted by the DDA without following the APA rulemaking procedures. After the DDA ignored several attempts to resolve this matter without resorting to the judicial process, a Petition for Declaratory Judgment was filed seeking an order from the Circuit Court of Howard County that Policy Number 152 was an invalid regulation, and that any decisions or actions made pursuant to it were invalid. Shortly after the filing of this lawsuit, the DDA abolished the Forensic Review Board and agreed in a Memorandum of Understanding that it would "not reconstitute any entity absent the adoption of regulations under the Maryland Administrative Procedure Act."[63]

In 2005, the Court of Appeals of Maryland decided *Massey v. Secretary, Department of Public Safety & Correctional Services*[64] (DPSCS) in which the court held invalid "Directives" of the DPSCS.[65] These Directives created and defined administrative offenses for which inmates were subject to administrative discipline.[66] The Directives also set forth the types of discipline available upon a finding of guilt, and set forth procedures for charging inmates with offenses and for imposing discipline.[67] These Directives were adopted by the DPSCS without compliance with the APA requirements for a regulation.[68] The Secretary of the DPSCS took the position that the Directives were not regulations. The Court of Appeals of Maryland held that the Directives were "clearly" regulations.[69] The Court wrote:

> [The Directives] constitute statements that have general application throughout all of the correctional institutions in DOC [Department of Corrections] and

63. Seelenbinder v. Sabatini, No. 13-C-04-58287 (Howard County Cir. Ct., 2004) (on file with author).
64. 389 Md. 496, 886 A.2d 585 (2005).
65. *Id.* at 498-99, 886 A.2d at 587.
66. *Id.* at 498, 886 A.2d at 586.
67. *Id.* at 498, 886 A.2d at 586-87.
68. Massey v. Sec'y, Dep't of Pub. Safety and Corr. Servs., 389 Md. 496, 498-99, 886 A.2d 585, 587 (2005).
69. *Id.* at 507-08, 886 A.2d at 592.

> apply to all inmates in those institutions; they have future effect; they were adopted by [an agency] to carry out laws that the [agency] administers; and they are in the form of rules, standards, statements of interpretation, and statements of policy.[70]

The Court of Appeals of Maryland also unanimously rejected the agency's argument that the Directives concerned only the internal management of the agency and did not affect directly the rights of the public or the procedures available to the public.[71] In so ruling, the Court held that if a regulation affects fundamental rights, it cannot be characterized as pertaining only to internal management,[72] and that the internal management exception to the APA rulemaking procedures does not apply if the agency statement substantially affects rights of the public.[73] In *Massey*, the Court agreed that prison inmates are "part of the public."[74] The Directives were held invalid.[75]

The *Massey* case also tried to send a message to the State that it should start to pay attention to this rulemaking procedure issue. It noted that although only a few Directives were at issue in this case, there were "seven substantial volumes of them."[76] The court added: "We do caution the Secretary and the Commissioner to review very carefully all of the directives that they have issued . . . and determine, at least from their perspective, whether, in light of this Opinion, they need to be adopted in the form of regulations."[77]

V. EVANS' APPEAL

A few weeks after the *Massey* opinion, Evans filed with the prison warden a request for administrative relief based on the argument that the lethal injection execution protocol set forth in the EOM constituted regulations that were invalid because they had been adopted without following the Maryland APA procedures for a regulation.[78] The warden denied this request for relief, and Evans appealed the warden's

70. *Id.*
71. *Id.* at 524, 886 A.2d at 602.
72. *Id.* at 518, 886 A.2d at 598.
73. *Massey,* 398 Md. at 520, 886 A.2d at 599.
74. *Id.* at 522, 886 A.2d at 600 (citing Martin v. Dep't of Corrs., 424 Mich. 553, 384 N.W.2d 392 (1986)).
75. *Id.* at 499, 886 A.2d at 587.
76. *Id.* at 501, 886 A.2d at 588.
77. *Id.* at 508 n.3, 886 A.2d at 592 n.3.
78. *Evans,* 396 Md. at 348, 914 A.2d at 70.

decision to the DOC.[79] When the DOC also denied any relief,[80] Evans appealed this decision to the Inmate Grievance Office (IGO).[81] The IGO delegated its authority to hear the case, and to make a proposed decision, to the Maryland Office of Administrative Hearings (OAH), a central hearing agency.[82] The administrative law judge ("ALJ") ruled that the execution protocols in the EOM were indeed regulations under the APA, and because they had been adopted without complying with the APA procedures for adopting regulations, the EOM was invalid and could not be used to execute Evans.[83] This proposed decision by the OAH ALJ was then sent to the Secretary of the DPSCS, who had authority to make the final administrative decision.[84] The Secretary's decision was that the EOM "is not a regulation requiring adoption pursuant to the APA rule-making provisions."[85] This issue was eventually decided by the Court of Appeals of Maryland which ruled that the EOM was a regulation.[86]

The Court of Appeals of Maryland first set forth the APA's procedural requirements for the adoption of a regulation.[87] It then noted that none of the procedures had been followed by the DOC in adopting the EOM.[88] The Court then set forth the APA definition of regulation, and addressed the reasons why the Secretary of DPSCS had ruled that the EOM was not a regulation.[89] First, in response to the Secretary's conclusion that the EOM did not have general application, the Court wrote that: "there can be no legitimate doubt that the portions of the EOM that govern the method of and procedure for administering the lethal injection have general application and future effect, were adopted to detail or carry out a law that DOC administers, and govern the procedure of DOC."[90] In response to the Secretary's position that the EOM concerned only the internal management of DOC and did not directly affect the rights of the public, the Court responded that the EOM affected "not only the inmates and the

79. *Id.* at 332, 914 A.2d at 70.
80. *Id.* at 333, 914 A.2d at 70.
81. *Id.* at 332-33, 914 A.2d at 70.
82. *Id.*
83. *Evans,* 396 Md. at 333, 914 A.2d at 70.
84. *Id.*
85. *Id.*
86. *Id.* at 349-50, 914 A.2d at 78.
87. *Id.* at 348, 914 A.2d at 79.
88. *Evans,* 396 Md. at 345, 914 A.2d at 78.
89. *Id.*
90. *Id.* at 346, 914 A.2d at 78.

correctional personnel, but the witnesses allowed to observe the execution and the public generally, through its perception of the process."[91] Because the EOM had not been adopted pursuant to the APA procedures, the lethal injection protocols were "ineffective and may not be used until such time as they are properly adopted."[92] The death penalty in Maryland was halted "until such time as the contents of [the lethal injection] checklist . . . are adopted as regulations in accordance with the requirements of the Administrative Procedure Act or the General Assembly exempts the checklist from the requirements of that Act."[93]

VI. POTENTIAL IMPACT OF *EVANS*

From an Administrative Law perspective, *Evans* is not a significant case. *Evans* is a straightforward application of *Delmarva* and *Massey*. *Evans* does not make new Administrative Law. Anyone who read *Delmarva* and *Massey* would have predicted the holding in *Evans*.

From a death penalty perspective, *Evans* is a monumental case. All executions in Maryland have been halted by its holding. *Evans* has reopened the debate over the death penalty in Maryland. Unless legislation is enacted which exempts the death penalty protocols from the APA rulemaking requirements,[94] there will be no death penalty in Maryland until a consensus can be reached in favor of the death penalty and on the method and details of execution.

Because of its tremendous significance as a death penalty case, *Evans* may also become a significant case in Maryland Administrative Law. This may be true not because of its analysis of the APA definition of regulation and the procedures that need to be followed for any agency action that satisfies that definition – this article has already discussed that *Evans* is a simple application of past case law – but because of its potential impact on Maryland agencies. It does not appear that prior decisions from the courts – all of which were against the State – motivated State agencies to review their directives,

91. *Id.* at 349, 914 A.2d at 80.
92. *Id.* at 350, 914 A.2d at 80.
93. *Evans*, 396 Md. at 350, 914 A.2d at 81.
94. I strongly oppose such legislation. *See* Arnold Rochvarg, *Senate Should Not Exempt Death Penalty Regulations from the APA*, THE DAILY RECORD (Maryland), Mar. 2, 2007. During the 2007 legislative session, both the House of Delgates and the Senate rejected bills that would have amended the APA to exempt death penalty regulations from the APA's rulemaking requirements.

guidelines, bulletins, policies, or whatever the agency called them to determine whether the agency was in compliance with the APA. Nor have past defeats in the courts seemed to have stopped State agencies from continuing to adopt more of these regulations without complying with the APA. Perhaps, hopefully, *Evans* will lead to a change in attitude of State agencies in their awareness of and obligation to the procedural requirements of the Maryland APA. The public is now aware of this issue. Moreover, State agencies should now understand that the Court of Appeals of Maryland has demonstrated that it is willing to enforce the APA requirements in a meaningful manner.

The full extent of the invalid regulation problem in Maryland is not clear. Only the State agencies themselves know how many regulations exist within their agencies that have not been properly adopted. It is much more preferable if this issue is resolved through agency review of its own files rather than individual lawsuits in the courts.

VII. CONCLUSION

The Administrative Law issue raised in *Evans v. Maryland* was not unique. What is unique about the opinion in *Evans* was the issue's application to a public policy issue which attracts tremendous public attention. For this reason, *Evans* may become not only a leading death penalty case but also a leading Administrative Law case.