

precious gaze. Artists are supposed to choose the real over the fake; Hollywood chooses the fake over the real.

Mel Gibson's movie drew scorn not because it wasn't real but because it wasn't fake. Had Gibson falsified the historical narrative, bringing it into line with

Hollywood sensibilities, he would probably have won some Oscars. Nobody in the media seemed to have noticed that after a year of lecturing Gibson about "gratuitous violence," Hollywood ended up celebrating the ultimate act of gratuitous violence, suicide — a turn of events beyond the satire of Chris Rock. CPR



## The Law

### The Coastal Commission is unconstitutional

*Designed to trample rights with impunity, this rogue agency operates exactly as planned.*

HAROLD JOHNSON

**Y**OU CAN'T delegate responsibility, goes the old saying. In other words, if someone is authorized to act in your name, you can — and should — be accountable for what that agent does.

Representative government is founded on this doctrine. Makers of public policy must be answerable to the people. But if they're not directly elected themselves, then at least they should be appointed by officials who are, so that elected officeholders can be held to account for how government treats the governed.

Unfortunately, one of the major currents of American political history for at least six decades has been the erosion of the accountability doctrine. In its place we now have the "administrative state" — *i.e.*, rule-making by bureaucrats not clearly answerable to the electorate or to anyone who has to face the electorate.

Franklin Roosevelt got the ball rolling by vastly expanding Washington's regulatory apparatus with an "alphabet soup" of organized meddling: *e.g.*, the Agricultural Adjustment Act, to tell farmers what to plant, and the Works Progress Administration, to tell businesses what to pay employees. Although such agencies are technically part of the executive branch, as a practical matter they've been autonomous cen-

ters of power over people, insulated from normal checks and balances.

Rule by regulators has also been steadily gaining ground at the state and local levels. A landmark date in this regard was 1972, when (pursuant to a statewide initiative) the California Coastal Commission was established and charged with guarding against what its proponents called "unbridled development" along the ocean's edge (and miles inland).

The Coastal Commission's structure and mission violated two venerable principles: That zoning and land-use decisions should be left to local government and that administrative agencies should have at least the appearance of accountability to elected officials in the executive branch of government.

**T**HE ENVIRONMENTALISTS who designed the Commission didn't want then-Gov. Ronald Reagan to have ultimate say over its membership, so they denied him, and future governors, both the power to appoint a majority of the commission's board and the accountability for the board's actions that is an essential part of democratic government. Instead they gave the Legislature eight of the commission's 12 governing member appointments; the governor appoints only four.

The commission's crafters achieved their goal: A

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rogue agency not subject to the jurisdiction of any elective body (even the Legislature's influence was diluted because its appointments were split evenly between the leaders of the two chambers.) Consequently, the phrase "California Coastal Commission" has become synonymous with "arrogant," "hostile," and "unreasonable" as it has gone about its task of micro-managing what is done with private property and bullying the owners.

**A**LL OF the foregoing is by way of background to a potentially landmark case now before the California Supreme Court: *Marine Forests Society v. California Coastal Commission*. Oral arguments were heard in the case in early April. At issue is precisely the rogue structure and status of an agency deliberately designed to be beyond the second-guessing of government officials who must face voters. In a case brought by an Orange County environmentalist who had a promising project scuttled by the coastal panel, Sacramento Superior Court Judge Charles C. Kobayashi declared the commission's organizational chart to be unconstitutional. Because it writes and enforces regulations, the judge noted, it is an executive branch agency. Yet things have been arranged so that the chief executive — the governor — doesn't have ultimate say over its membership. He can't hold them accountable — and voters can't hold him accountable. All very nice and tidy — if you're a bureaucrat who wants to act like a divine right monarch.

The Third District Court of Appeal upheld Kobayashi's ruling; the Coastal panel appealed, so now it is up to the state Supreme Court to strike a blow for representative democracy by recognizing that the Commission violates separation-of-powers principles. Questioning by the judges at oral argument suggested that there may be a majority who grasp the threat to freedom in the current arrangement and have the courage to order a change.

A toast is due to the never-say-die plaintiff in this case, 73-year-old Rodolphe Streichenberger. He and his nonprofit Marine Forests Society laid an artificial kelp bed off Balboa Peninsula, using tubes and tires.

The experiment attracted sea life in abundance. But it also drew a depth charge from the Coastal Commission, which claimed that not enough bureaucrats had signed off on the project. Represented by Pacific Legal Foundation co-founder Ron Zumbrun, Streichenberger went to court — asking not merely for reversal of the commission's decision, but for torpedoing of the commission itself as an unconstitutional entity.

If Streichenberger's victory is upheld at the Supreme Court, the Coastal Commission may have to be dramatically restructured. Hurrahs over this possibility have been heard up and down the state because legions of property owners and local officials can tell tales of the agency's arrogance.

Nearly 20 years ago, UC Santa Barbara economist H.E. Frech III voiced some of the concerns that underlie Judge Kobayashi's ruling: "The law [establishing the commission] runs counter to the American tradition by transferring effective property rights of individuals to a state agency largely isolated from the electorate. Even more disturbing to the moral sense of many observers, compensation is rarely paid to the victims of the loss or devaluation of effective property rights."

The Commission has offered tutorials in how unchecked power invites abuse. The infamous commission member Mark Nathanson drew a felony conviction for demanding money from property owners seeking a favorable vote on their land-use requests. Also, when a member can pledge that his vote can be turned by what amounts to a bribe, it indicates there are no meaningful standards to guide decisionmaking.

The U.S. Supreme Court displayed exasperation with the commission's standardless procedures in an important 1987 decision, *Nollan vs. Coastal Commission*. The Nollans, owners of a dilapidated beach cottage, wanted to tear it down and build a house in its place. The commission said it would agree only if they granted a public easement across their property. That didn't fly with the Nollans — or the Supreme Court. It ruled that the Coastal Commission hadn't shown justification for tying this unrelated condition to approval of a building permit.

"In my experience, the Coastal Commission picks on little people who have no impact on the environment," Jim Fosbinder, a real-estate attorney in Venice told an interviewer.

**H**E CITED the case of an L.A. County homeowner punished for selling separately two pieces of land that the Coastal Commission had decreed must be sold jointly. "Both sites are subject to building prohibitions, so nothing is going to be put on them that obscures anyone's view," said Fosbinder. Yet the commission sued the landowner for tens of millions of dollars. Fosbinder alleged that the commission's action was in retaliation for the property owner's successful suit against the agency when it tried to stop him from building a single-family home on land sev-

eral blocks inland from the coast. But whatever the motivation, it was a heavy-handed display of firepower for the offense of not selling two parcels as a pair.

Even many people not directly subject to the commission's dictates suffer an adverse financial effect. In 1982, Professor Frech of Santa Barbara, focusing on Ventura County, documented how the commission's land-use restrictions made housing and rentals less affordable as far as 7.5 miles in from the shore.

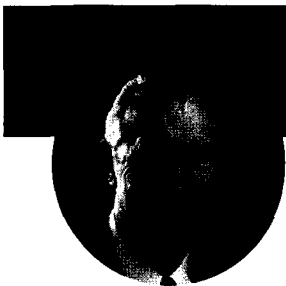
Because the aesthetic advantages of these land-use policies were confined to the area just around the coast, Frech concluded that people renting or seeking to buy in neighborhoods several miles inland were confronted with new costs without any compensating benefits. These people, the losers in the equation, tended to be less-well-off financially. He theorized that this is one reason that low-income people "were especially likely to vote against the Coastal Initiative" when it was on the ballot in 1972.

Years have gone by, but Frech's findings still apply: Coastal Commission land-use restrictions still make housing costlier than it need be.

There is a better strategy for aesthetic and ecological protection than the hyper-regulatory model embodied by the Coastal Commission. The superior approach was noted by the Supreme Court in the Nollan case, where Justice Antonin Scalia said that if government "wants an easement across (the landowners') property, it must pay for it." In other words, get the public sector to buy environmentally sensitive land, rather than to seize it, in all but name, through intrusive regulation.

Better yet, private conservancy groups could be encouraged to purchase and maintain lands that are appropriate for protection.

These strategies have the benefit of safeguarding not just natural areas but another of our fragile heritages: property rights and personal freedom. OFF



# Those in power over us

## Sierra Club identity crisis

*Extremely green, a money-making machine, but with few real accomplishments to show.*

M. DAVID STIRLING

**D**ESPITE THE failures of hardcore environmental organizations to diminish George W. Bush's convincing re-election victory, several are again attacking the administration in hopes of obstructing the president's second-term environmental agenda. And, as the wildfire season in our forests rapidly approaches, the Sierra Club is again leading the effort.

### OPPOSING HEALTHY FORESTS

The focal point of the Sierra Club's attack is the Giant Sequoia National Monument in south-central California. In a recent mailing to hundreds of thousands of households nationwide, Sierra Club Executive Director Carl Pope decries Bush's "Healthy For-

est" logging plan for "allowing commercial loggers to blaze through ancient forests with chainsaws, cutting large, old trees" .... "The mighty Sequoias have lasted for over 3,500 years and are the oldest organisms on Earth. Don't let them be destroyed in just two terms of the George W. Bush Administration" .... "When industrial interests and the health of our natural resources are at odds, the Bush Administration chooses industry almost every time." The mailing asks recipients to sign and mail "Save the Giant Sequoias" peti-

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