Rulemaking, Bias, and the Dues of Due Process at the FTC

Jeremy Rabkin

MADISON warned us at the birth of the Constitution that "enlightened statesmen will not always be at the helm" even in the prestigious councils of the federal government. But whereas *The Federalist* urged a more broadly competitive politics to compensate for the deficient enlightenment of statesmen, our tendency in this century has been to seek political insurance in the procedural vigilance of judges.

A milestone of sorts in this accelerating trend was reached with the November 3 decision of Judge Gerhard Gesell of the District Court for the District of Columbia, disqualifying the chairman of the Federal Trade Commission from further participation in the commission's consideration of proposed regulations against children's advertising on television. Newspaper accounts of Gesell's ruling in *National Advertisers* v. *FTC* have largely focused on how it may affect the commission's ultimate decision on the controversial "KidVid" rules. But the case is also worthy of attention as an object lesson in the futility of our efforts to reconcile broad regulatory authority with popular government through mere legal formulas.

The case against FTC Chairman Michael Pertschuk had been launched by the Kellogg Company, the Toy Manufacturers of America, and a coalition of groups representing the advertising industry. They complained that Pertschuk would be incapable of providing a "fair and impartial" hearing to their arguments against the proposed restrictions on children's television advertising since he had already shown himself a convinced partisan on the central issues of the controversy. And indeed it was relatively easy for them to demonstrate, from the record of Pertschuk's public speeches on the subject, that the chairman retained something less than an open mind on whether advertising aimed at children constituted the sort of "unfair and deceptive" business practice prohibited by the Federal Trade Commission Act. He had frequently condemned the "exploitation" and "manipulation" of children by "slick" television advertising. He had also repeatedly promised public interest groups that he would see to it that the FTC took action on the matter—rather plainly suggesting more action than a mere *consideration* of the proposed regulations. Pertschuk's public rhetoric identified him with a particular side in the controversy and surely lacked the discretion one would expect of a judge in a pending trial.

What made Judge Gesell's decision so remarkable, though, was that the issue of bias arose in this case in the context of a rulemaking proceeding rather than an adjudication and therefore, one could argue, Pertschuk should never really have been expected to conduct himself like a judge. In fact, it is quite rare for the courts to intervene in an ongoing administrative proceeding even when there is reason to suspect biased judgment, since charges of bias can always be considered by the courts on appeal of the agency's final decision. But Gesell's decision to intervene against bias in a rulemaking proceeding was a genuine novelty, setting a precedent we may have much cause to regret (assuming the decision is not overturned by the court of appeals later this year).

In technical terms, Gesell's decision can still be readily justified. Traditionally, it is true, the due process requirements in administrative law have been concerned with ensuring fair and impartial hearings in the adjudication of charges against individual offenders, where the regulatory commissions have been regarded as acting in a "quasi-judicial" capacity. Rulemaking, though, has traditionally been regarded as much less susceptible to dangerous abuse, because administrative rules, like legislative enactments, apply only prospectively and in gen-

Jeremy Rabkin is a research associate at the American Enterprise Institute.

eral terms; for this reason rulemaking was left relatively unencumbered with procedural safeguards until recent years. But the FTC's authority to issue binding regulations is now governed by the so-called Federal Trade Commission Improvement Act of 1975, more commonly known as the Magnuson-Moss Act. By its terms the FTC's trade regulations can be adopted only on the basis of commission proceedings virtually as formal and elaborate as those already required in adjudications. Judge Gesell thus held that under the statutory requirements of Magnuson-Moss, FTC rulemaking is "neither wholly legislative nor wholly adjudicative" but rather "combines substantial elements of both types of proceeding." And on this basis he ruled that Pertschuk should have observed all the proprieties of an adjudication in his public statements on the children's advertising rulemaking.

The decision in *National Advertisers*, then, can be regarded as a justifiable—though probably not an unavoidable—inference from the unusual procedural requirements of Magnuson-Moss, which in effect dress up rulemaking to look like adjudication and leave it to the courts without further guidance to complete the costume. Thus an evasive Congress may be more to blame for the result than an "imperial judiciary." The decision is, in fact, merely the latest instance of a "judicialization" of rulemaking which has been the joint product of the Congress and the courts (see Antonin Scalia, "Two Wrongs Make a Right: The Judicialization of Standardless Rulemaking" in *Regulation*, July/August 1977).

But the result, at all events, is plainly unfortunate. Given the larger trends in administrative law behind it, it is likely to cast a long shadow quite apart from the immediate implications of the Magnuson-Moss Act for the FTC. Already trucking companies have been encouraged by the ruling to file suit against Chairman Daniel O'Neal of the Interstate Commerce Commission, charging that his public advocacy of trucking deregulation should disqualify him from presiding over ICC hearings on the issue. It may turn out that in practice regulatory commissioners will escape Pertschuk's fate simply by inserting a tactful "alleged" here and there in their public speeches. But, according to former FTC Chairman Calvin Collier, the mere threat of such disqualification suits could have a "substantial chilling effect" on the readiness of commissioners to talk about their activities and concerns in public.

Of course, those who believe that the regulatory commissions are already too political may see nothing to regret in such a result. But it is certainly not clear that removing the regulatory commissions altogether from politics would be desirable, since it is only too clear that politics cannot be altogether removed from regulatory activity. Unlike the courts, which can only judge disputes brought before them by outside parties, the commissions can generally set their own regulatory priorities by deciding which possible violations to pursue and which new areas for rulemaking to explore. They thus tend to be judged more by their effectiveness in coping with publicly perceived problems than by their "impartiality" or procedural fairness. Given limited resources to handle extremely broad mandates, commissioners must continually make difficult judgments about how much the Congress—or the public—expects in different areas, or how much the business community will voluntarily accept, or how much effort and expense can be spared to compel business compliance by enforcement actions. Even the determinations that commissions must reach in formal proceedings are often closer to those considered in legislative debate than in the typical courtroom proceeding, as the present controversy over children's advertising well illustrates: Are children's desires for sugared cereals so influenced by television advertising—or so little beyond the control of parents—that protective action is warranted? And would the benefits of any feasible action really outweigh the attendant social costs (for example, the loss of advertising revenues that might have supported more public affairs broadcasting)?

It is essentially in recognition of the political character of regulatory activity that the practice of addressing trade conventions and other public gatherings has long been an accepted part of the commissioner's job—at the FTC as well as at most of the other regulatory agencies. Often these speeches represent relatively costless efforts to induce compliance with a commission's norms or objectives by "jawboning" or by moral suasion. Or the speeches may be used to test public reaction before the commission commits itself to a controversial new course. On the other hand, com-

missioners may seek to dramatize certain problems to help build a public constituency that will champion their pleas for higher budgets, new laws, or simply moral support from Congress. Pertschuk's moralistic rhetoric on children's advertising, for example, was undoubtedly motivated in part by his interest in stimulating pressures on Congress to offset the lobbying of broadcasters and other opponents of restrictions on children's advertising.

At the same time, of course, one would not want individual adjudications to be decided on a narrowly political basis. When a commission sits in judgment on a particular company or individual, basic fairness obviously requires that the commissioners keep an open mind until they have heard all the evidence on both sides. And, in fact, elaborate procedures have been devised to ensure such impartiality—for in these adjudications, as Judge Gesell noted, even the appearance of impartiality is important. The question raised most pointedly by *National Advertisers* is whether it is reasonable to ask the same due-process proprieties in administrative rulemaking as in administrative adjudication—to demand as much, that is, when regulatory commissions act in effect as legislators as when they act as judges.

The distinctions involved, it is true, are not quite so clearcut as one might wish. The commission in this instance, for example, might have chosen to proceed by an adjudication of initial charges of "unfair and deceptive" trade practices against only the Kellogg Company or only against the toy manufacturers for their television advertising aimed at children. Since the issues involved would be almost equally broad and equivocal and the judgment rendered might become a controlling precedent, one could argue that such an adjudication would have as much of a legislative character as the present rulemaking. But it still makes more sense to be concerned about the appearance of prejudice when it is exercised only against a particular company or segment of an industry. For years critics of the regulatory commissions have urged them to proceed more often by rulemaking than by adjudication, in the interests of fairness as well as efficiency. But because a general rule immediately affects more interests than any particular adjudication, it is also likely to arouse more political opposition—which is doubtless one reason the commissions have often preferred to proceed by the less provocative route of adjudication. When the commissions agree to proceed by the more explicitly political path of rulemaking, it is more than a little strange for courts to direct (or, in this instance perhaps, for Congress to suggest) that the commissioners conceal the political character of the activity.

It is no accident, though, that Congress and the courts in recent years have begun to require more and more elaborate procedures for administrative rulemaking. Having delegated an extremely broad regulatory authority to the commissions, Congress naturally prefers to think—or at least prefers the public to think—that decisions will be guided by expert determination rather than political judgment. The courts, apparently despairing of adequate congressional oversight, seem to have concluded that more formal rulemaking procedures will ensure better administrative decisions. Strenuous efforts to maintain the appearance of expert impartiality on the part of the commissioners follow, then, from the doubts about their political accountability—for certainly an accountable commission could not be any more impartial than the political authorities to which it was held to account. Indeed the more the commissioners keep up the appearance of sober impartiality the easier it is for Congress to avoid calling them to account—though in fact Congress retains an array of quite adequate mechanisms to do so.

Still, it is rather strange to find a democratic legislature embracing the notion that political or legislative decisions will retain more legitimacy or public confidence if made by institutions as much as possible like courts and made by officials with as much discretion and political isolation as judges. But perhaps it is less surprising to find it endorsed by the courts at a time when judges have displayed so much confidence in the ability of the judicial process to settle highly controversial political issues and highly complex administrative problems. The effort to invest administrative rulemaking with the aura of impartial expertise is far more likely to promote public cynicism about regulatory agencies than public respect for their decisions. One only wonders whether there is more to fear from the likely failure of this effort—or from the slight chance that it will succeed. ■