The Judicialization of Standardless Rulemaking

Two Wrongs Make a Right

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THE subject of the present article is administrative procedure. By definition, procedure does not deal with the substance of controversial issues; and by nature, it is an arcane, bloodless, and thus unattractive subject of study—for legislators no less than for the readers of *Regulation*. For these reasons, as all wise lawyers know, a change in governing procedures is the simplest way to effect a basic change in the end product (that is, the substance) of governmental action.

This article is prompted by, though it is not really about, that aspect of the *Home Box Office* decision (noted on pages 4–5, this issue) which deals with administrative procedure. That holding finds ex parte contacts to be unlawful in agency rulemaking, which means that all discussions of the issues between persons outside the agency (including members of Congress) and agency heads and staff will henceforth have to be "on the record" and with notice to other participants in the proceeding. It is, in my opinion, quite likely that the Supreme Court will reverse the holding, since it is—in respects which it is beside the point to pursue here—sharply out of accord with governing statutory provisions and their legislative history. Right or wrong, however, the decision represents a trend, on the part not merely of the courts but of the Congress and the executive branch as well. That trend is likely to continue unabated. My interest here is in considering briefly its effects upon the character of federal administration.

The trend I refer to is what might aptly be termed the progressive judicialization of the rulemaking process. To perceive the phenomenon, one must understand the basic procedural structure which was established in 1947 by the Administrative Procedure Act (APA), and which is still the generally applicable framework for administrative action. This consists of a formal procedure and an informal procedure. The former, applicable primarily to the category of agency action known as adjudication, is based upon the common-law judicial model: it presumes adverse parties litigating a relatively particularized factual issue. Since one of those adverse parties may be (and usually is) the agency staff itself, seeking, for example, to impose a sanction for alleged violation of law or of agency regulations, the formal procedure includes a "separation-of-functions" provision, which rigidly separates the litigating portion of the agency from the decision-making portion. At the initial stage, the proceeding is conducted and the decision made by an administrative law judge whose tenure and compensation are not under the agency's control. Like a common-law trial, the formal APA procedure confers a right to present oral evidence and to conduct reasonable cross-examination of witnesses; the transcript of this proceeding, along with all documents filed, "constitutes the exclusive record for decision"; and the courts

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must reverse an agency decision "unsupported by substantial evidence" in this record.

In contrast to this judicialized procedure, there is a prescribed informal procedure that is used for virtually all agency rulemaking. This is the "notice-and-comment" procedure, under which the proposed rules developed by the agency staff are published in the *Federal Register* and written public comments invited. As a discretionary matter most agencies frequently hold public hearings on rules of major impact, but such hearings typically resemble a congressional committee hearing rather than a common-law trial. They need not be chaired by an administrative law judge; witnesses are not subject to cross-examination by adverse parties; and the committee staff which drafted the proposed rules, and which may appear to explain and defend them, is not subsequently excluded from advising on the final question of whether the rules should be adopted. When judicial review is sought, and in the absence of any contrary statutory provision, the applicable standard is not whether the rules are "supported by substantial evidence," but whether they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

As the legislative history of the APA shows, the formal and informal procedures described above were primarily meant to govern, respectively, the "judicial" and "legislative" aspects of agency action.

> The bill provides quite different procedures for the "legislative" and "judicial" functions of administrative agencies. [Senate Report No. 752, 79th Congress, 1st session, 1945.]
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> First, there are the legislative functions of administrative agencies, where they issue general or particular regulations which in form or effect are like the statutes of the Congress. . . . Congress—if it had the time, the staff, and the organization—might itself prescribe these things. Because Congress does not do so itself and yet desires that these things be done, the legislative power to do them has been conferred upon administrative officers or agencies.
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> The second kind of administrative operation is found in those familiar situations in which an officer or agency determines the particular case just as, in other fields of law, the courts determine cases. . . . What the agencies do in these cases is to determine, just as a court might determine, the liability of a party or the redress to which a party is entitled in a specific case on a specific state of facts and under stated law. [Statement of Rep. Francis E. Walter, member of House Judiciary Committee, *Congressional Record*, May 24, 1946, pp. H 5647-5655.]

What has developed since the enactment of the APA—and with an accelerating pace in recent years—is a progressive conversion of the informal procedure to the formal, an assimilation of the legislative model to the judicial.

This development was to some extent inevitable because of the central position occupied by the courts as the forum for reviewing not only adjudication but rulemaking as well. The judicial procedures are those with which the courts are most familiar and in which they repose the greatest confidence. Moreover, court review is cumbersome and inefficient (if not totally ineffective) when superimposed upon a decisional process that is not specifically designed, as is the judicial model, to facilitate such review by placing all of the relevant material upon a "record." Thus, the courts have imposed upon the rulemaking process procedural requirements well beyond what was originally envisioned. They have mandated such significant procedural steps as the publication of information in the agency's possession relevant to the proposed rules, a detailed statement of the agency's reasoning and its factual basis, explicit response to all major contentions raised by participants in the rulemaking proceeding, in some cases cross-examination of expert witnesses, and most recently—if the *Home Box Office* decision is upheld—abstention from ex parte contacts. Moreover, the APA standard for court reversal of agency rulemaking ("arbitrary, capricious or an abuse of discretion") has been applied in such a way that many informed observers consider it indistinguishable from what was meant to be the more stringent "substantial evidence" test applicable to adjudication.

It is, however, not only the courts that have been responsible for the progressive judicialization of the rulemaking process. The Congress, in making new delegations of rulemaking authority, has repeatedly departed from the scheme of the APA, invariably in the direc-

tion of assimilating rulemaking to APA formal adjudication. Oral proceedings (though without cross-examination) are often required; the provision of a "substantial evidence" review standard for particular rulemaking has become commonplace; and in very recent enactments the Congress has even defined a "record" for rulemaking purposes. The executive agencies themselves have also contributed to the formalization of the process. As the court noted in *Home Box Office,* for example, the FCC had criticized the practice of ex parte contacts and had suggested that it might impose some constraints against them.

With the foregoing as painful but necessary prologue, let me come at last to my point, which is the effect of these procedural developments upon the nature and the product of federal administration. I take it to be axiomatic that, in a democratic government, agency rulemaking is meant to reflect the will of the elected assembly. This goal can intelligently be pursued in one of two ways. First, the delegation of legislative, rulemaking authority may be made with such precise instructions concerning the end to be achieved that logic and technological competence (which are qualities reviewable by the courts) will dictate a relatively narrow range of results. Or, second, the manner of exercising an imprecise delegation may be designed to reflect the same forces that work upon the legislature itself, and thus to produce approximately the same results.

Until the 1930s the federal government had, formally at least, chosen the first of these courses. "Congress," said the Supreme Court (and seemed to mean it), "cannot delegate any part of its legislative power except under the limitation of a prescribed standard." This was the principle of unconstitutional delegation of legislative authority—which, if it was ever really followed, has in any case not been applied since 1935. Modern delegations include standards no more precise (and no more limiting) than the injunction to adopt rules "in the public interest." The system has functioned reasonably well, however, because—either consciously or through that instinctive capacity for fashioning workable arrangements that characterizes Anglo-American politics—the second method for achieving rough compliance with the legislative will has in fact been adopted.

It is unquestionably true that the regulated industries have had—to use the censorious phrase adopted by the *Home Box Office* case—"undue" influence in the rulemaking decisions of their governing agencies. The court might have added that Ralph Nader, Common Cause, and the Sierra Club have also had "undue" influence—in the sense that their positions, like those of the proximately affected industries, have been given greater weight than positions espoused by, let us say, private citizens such as you and me. The rulemaking process has assuredly not been an open forum producing an ultimate decision which values each presentation on the basis of its intrinsic intellectual worth, with no regard to the *political power* of its proponent. To be sure, the initial stage of agency action has consisted of inquiries and investigations designed to elicit all the facts and to disclose, where possible, the most rational solution; but the final rules have been undeniably political—not (hopefully) in the partisan sense, but in the sense that the sometimes irrational desires of the public and of interest groups within the public have affected the outcome. This would be grave criticism of a court, but is it so clear that it is proper ground for censure of the agencies? Is it so clear that it produces a result that contradicts, rather than parallels, the result that would obtain in that best of all possible worlds, where the legislature itself does all the rulemaking? I suggest that the answer is quite clearly no. If the views of the airlines (and of the Airline Passengers Association) are given greater weight by the CAB than the views of John Doe, one would expect them to be given "undue" weight by the Congress as well, with respect to legislation vitally affecting their selfish interests. This process of accommodating public desires, including the ardent support or vehement opposition of interest groups most proximately affected, is an essential part of the democratic process, however untidy and unanalytic it may be. To prohibit rulemaking agencies from seeking such accommodation, and at the same time to give those agencies no more specific legislative charge than to act "in the public interest," is to convert a large segment of our legal system into a technocracy. It may indeed be true that the present system of what I might term "politically sensitive" agency rulemaking does not mirror, or mimic, congressional action with

sufficient accuracy; in my view congressional specification of intelligible and enforceable standards to be applied in the rules is a much more effective means of ensuring compliance with the popular will. But where such standards to guide the agency have not been imposed, the existing system seems infinitely preferable to the regime of "public policy by analysis" which the *Home Box Office* court evidently favors.

The reference to that case recalls me to the subject of procedure. Procedure is not imposed for its own sake, but rather because of its tendency to give greatest effect to those factors that are important in the decision-making process and to exclude those factors that are irrelevant. The imposition of judicial procedures and the application of a "substantial evidence," adjudication-type standard of review spring from a perception that rulemaking is essentially and perhaps exclusively an analytic and rational process, in which the "best" result is reached through collection and examination of all relevant facts by skilled officials aided in their deliberations by the arguments of interested persons. Such procedural developments are, in other words, in principle a repudiation of politically sensitive rulemaking—and in effect may be its destruction. An agency will be operating politically blind if it is not permitted to have frank and informal discussions with members of Congress and the vitally concerned interest groups; and it will often be unable to fashion a politically acceptable (and therefore enduring) resolution of regulatory problems without some process of negotiation off the record. A politically sensitive agency, moreover, may be able to demonstrate that its rules are not "arbitrary, capricious or an abuse of discretion," but can hardly be expected to meet a strict "substantial evidence" standard of review when the evidence is *not* the only applicable criterion.

As noted above, the procedural innovations that embody the ideal of depoliticized agency rulemaking have captured the imagination not only of the courts but of the Congress and (perhaps) the agencies as well. I do not mean to criticize that ideal, except when it is conjoined with an absence of specific, legislatively imposed standards. Institutional arrangements have a way of finding their own accommodation, however, and it will be no surprise if the continued judicialization of rulemaking procedures automatically produces a dramatic reduction of "standardless" rulemaking. This may occur in part because the Congress, seeing the failure of the judicialized process to approximate the results that Congress itself would produce, and finding itself constantly under pressure to reverse agency action at the instance of the constituencies whose "undue" influence at the agency stage has been eliminated, will simply decline to make or continue delegations of imprecise character. More likely still, the reduction may occur because the agencies themselves will refrain from entering into authorized "standardless" rulemaking whose political consequences they are prevented from taking into account. After all, the principal reason agencies give weight to political realities under the present system is that the penalty for failure to do so is punishment of the incumbent party at the polls, or more immediately, an embarrassing reversal of agency decisions through legislation, along with congressional retribution upon agency programs and appropriated funds. When, because of newly imposed procedures, the risk of these consequences cannot be assessed and cannot be taken into account in the final decision, the agencies will be inclined to seek safety in inaction—or will send legislative proposals to Congress instead of issuing definitive rules.

Hence my ambivalence toward the developments I have described. While an agency "legislating" under a political check is better than an agency "legislating" under no democratically imposed constraints at all, surely it is best for the Congress itself to determine the main lines of legislation—and to do so in detail much greater than the platitudinous goals of pursuing "the public interest" or preventing "sex discrimination." The judicialization of rulemaking, which seems to me generally prompted by motives which mistake the character of the rulemaking process in the present statutory context, is likely to compel a change in that context. We may be witnessing, under the guise of procedural reform, the return to a system of more limited congressional delegation. To that extent, out of evil cometh good—or out of a vaguely moralistic tinkering which misperceives the nature of existing processes, an accidentally better system for giving the people greater control.