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Administrative Law After Forty Years



By MARSHALL J. BREGER*

As we observe the 40th anniversary of the federal Administrative Procedure Act, it is appropriate to reflect on the state of administrative law.

Practitioners of administrative law, whether on the federal or state levels, have to be Jacks and Jills of all trades. They have to know the ins and outs of agency adjudication procedures, including the shifting constitutional boundaries of the due process clause, of the newly centralized rulemaking procedures and the more traditional challenges offered by rate-making and licensing in a deregulatory environment. They have to know how to use the tools offered by laws like the Freedom of Information Act, Privacy Act, Government in the Sunshine Act, and others. Moreover, appeals from agency action require a thorough knowledge of the ambiguous case law defining the scope of judicial review. Finally, a good administrative lawyer must keep a close tab on how executive task forces and legislative developments may affect agency operations, and thereby the interests of his client. This is, of course, the road map for the lawyers,

the "nutshell" syllabus for the law school course, but it's only the beginning. To really succeed, the administrative lawyer must master the substance of the regulatory scheme and also know the corridors and telephone directory of the agencies concerned. We sometimes forget how broad this field is. After all, the fields of immigration, tax, energy, environmental, securities, labor, health, election, communications, banking, or antitrust law are simply specialized applications of administrative law. As such, I've long felt that administrative law belonged in the *first* year curriculum of all law schools.

The field of administrative law, of course, predated the 1946 passage of the Administrative Procedure Act (APA). The first important regulatory agency was the Interstate Commerce Commission, set up in 1887 to regulate the then-powerful railroad industry. The Federal Trade Commission followed in 1914, and other major independent regulatory agencies covering power, securities, labor, communications, and aeronautics were creatures of the New Deal. As early as 1916, ABA President Elihu Root presciently stated, "If we are to continue a Government of limited power these agencies of regulation must themselves be regulated. . . . A system of administrative law must be developed. . . ." By the end of the 1930's, sharp debates over the appropriate role of administrative agencies were commonplace. Many legal groups decried the exercise of combined legisla-

tive, executive and judicial power by these agencies. President Roosevelt's Committee on Administrative Management in 1937 gave that sentiment a boost by stating that the independent commissions "constitute a 'headless fourth' branch of the Government" and by urging that they be abolished and absorbed into the Executive Departments. This view was incorporated into legislation known as the Walter-Logan Bill of 1940, strongly backed by the ABA. The bill passed both Houses of Congress but was vetoed by the President, who felt that the bill was motivated by "lawyers who desire to have all processes of government conducted through lawsuits and [by] interests which desire to escape regulation."²

On the other side was the extremely thorough report in 1941 of the Attorney General's Committee on Administrative Procedure, which traced the complete history of the administrative agencies and held that such agencies were necessary and proper instruments of the federal government. The Committee's report concluded that there were distinct "advantages of administration as compared with executive action" and that "limitations on effective legislative action," and upon "exclusively judicial enforcement," as well as the need for "organization to dispose of volume of business and to provide for the necessary records" were ample "reasons for resort to the administrative process."³ Eventually the Administrative Procedure Act grew out of a compromise between this Committee's proposed legislation and that urged by the ABA. The APA, which passed unanimously in 1946, accepted the administrative agency concept and then crafted procedural requirements onto it.⁴ The Act's signal accomplishments, which have stood the test of time, include the establishment of a firm legal status for agency hearing examiners (now administrative law judges); creation of a simple, open notice-and-comment procedure for agency rulemaking; and adoption of the substantial evidence rule in the judicial review of administrative decisions based upon records.

These aspects of the APA have allowed it to remain a viable guide to agency action today, when the 1985-86 U.S. Government Manual lists fifty-seven independent establishments and government corporations along with thirteen Cabinet Departments—all of which have significant regulatory responsibilities.

How has federal administrative law changed in the four decades since passage of the APA? In some ways it hasn't changed much at all. Commentators and reformers, including those of us at the Administrative Conference, are still struggling to

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streamline administrative proceedings, define the appropriate level of policy articulation, reduce delays, develop uniform rules of procedure, restate the scope of judicial review, and devise better ways of enforcing regulatory prescriptions. Moreover, some of the commentators are even the same: The 1941 Attorney General's Committee on Administrative Procedure, which laid the groundwork for the APA, was directed by Walter Gellhorn and staffed by Kenneth Culp Davis, both of whom remain leading professors and text writers in the field and prominent members of the Administrative Conference.

Nevertheless, much has changed in those forty years. The sheer size of the bureaucracy and the number of agencies making or enforcing laws has increased dramatically. One indication is that the number of federal administrative law judges making initial decisions in agency adjudications has jumped from 196 in June 1947 to 1,121 in June 1984.⁵ This growth in the administrative judiciary is mirrored by a concomitant burgeoning in agency rulemaking. In 1947 the *Federal Register* totaled 8,902 pages, while in 1985 it was 53,479, and this was dramatically down from the 1980 high-water mark of 87,012 during the zealous regulatory period of the Carter Administration.

Furthermore, the APA, which was nearly the sole governor of agency behavior for twenty years after its passage, has been joined by a sheaf of new government-wide procedural statutes in the following 15 years. First came the Freedom of Information Act (FOIA) in 1966 (significantly broadened in 1974) which, along with the 1974 Privacy Act and 1976 Government in the Sunshine Act, were codified within the Administrative Procedure Act. These, along with the Federal Advisory Committee Act of 1972 and the passage in 1980 of the Regulatory Flexibility Act and the Paperwork Reduction Act, created many new openness, public participation and clearance requirements for agencies to follow and for litigants to invoke against the government.

On the regulatory side, the National Environmental Policy Act of 1970 (NEPA), which required environmental impact statements to be prepared on major federal projects significantly affecting the environment, ushered in a regulatory era in which appeals to courts from federal agency actions multiplied and which saw the passage of major health, safety and environmental regulatory laws—often with special procedural requirements attaching to agency rulemaking and adjudicatory procedures. Finally, concerns about over-regulation led to Presidential Executive

Orders by Presidents Ford, Carter and Reagan which progressively strengthened the power of the Executive Office of the President (through the Office of Management and Budget) to oversee executive agency promulgation of new regulations and to enforce cost-benefit analysis requirements.

The Administrative Procedure Act, itself, was primarily geared to prescribing the procedures used for formal adjudication and formal rulemaking. However, formal rulemaking, a technique once used to prescribe standards, has now fallen into relative disuse largely due to the delay caused by the cumbersomeness of employing formal evidentiary hearing procedures to formulate rules of general applicability. For example, the famous FDA peanut butter proceeding took over nine years to resolve the issue of whether peanut butter should contain at least ninety percent peanuts (as proposed by the FDA) or eighty-seven percent peanuts (as proposed by industry). A transcript of 7,736 pages was generated.⁶ These excesses led to informal 'notice-and-comment' rulemaking becoming the primary device for agency policy-making. However, "informal" rulemaking was also fast becoming a misnomer. It is doubtful that the "framers" of the APA would have identified major rulemaking proceedings of the 1970's and 1980's as falling within the simple, three-step, notice-and-comment procedure spelled out in Section 4 (now § 553) of the Act. As outlined in the Act, the three steps are (1) notice of the proposed rule, (2) opportunity for submission of comments, and (3) a "concise general statement of [the final rule's] basis and purpose." Unfortunately, as agencies increasingly resorted to rulemaking to make policy, critics in the Executive, Legislative and Judicial branches sought to interpose checks in the form of new procedural steps, and notice-and-comment became merely a skeleton upon which was hung other requirements such as advance notices, OMB review of agency proposed and final rules, opportunity for cross-examination, agency responses to comments, findings and reasons in the statement of basis and purpose, supplemental comment periods, etc.

A 1972 report to the Administrative Conference, surveying regulatory statutes that required procedures in addition to notice-and-comment for the adoption of rules of general applicability, concluded that the procedural provisions in these statutes were "almost unbelievably chaotic" and that these provisions responded to pressures for additional procedural rights in a "totally ad hoc fashion."⁷ This trend, which shows no sign of abating, has

contributed to what former Administrative Conference Chairman (now judge and Supreme Court nominee) Antonin Scalia referred to as the "balkanization" of administrative procedure.⁸ One court, dismayed by the variety of statutory provisions, complained, that "[o]ne would almost think there had been a conscious effort never to use the same phraseology twice."⁹

We at the Administrative Conference have urged Congress to refrain from mandating new procedures beyond notice-and-comment,¹⁰ while we have also urged agencies to use such additional procedures voluntarily and selectively.¹¹ It is a recurring struggle, and while we strive to protect the APA's pristine original intention, we recognize that in today's more adversarial regulatory climate this portion of the Act may, itself, be in need of some retooling. Moreover, the Act is old-fashioned in another respect. Nowhere does the Act address the now-common technique of informal adjudication or alternative dispute resolution methods such as arbitration, mediation or negotiation.

Indeed, it is not surprising that the administrative law "roadmap" has become somewhat dated, since the terrain and the climate have changed as well.

Administrative agencies used to be considered part of the "headless fourth branch" of the government—somewhat of an illegitimate offspring. Now, however, there is little debate over their legitimacy. Instead, the leading issues pertain to how they should be overseen and by whom, how open they should be, what substantive authority they should have, and how their procedures can be streamlined. Moreover, as might be expected, the institutionalization of agencies as power centers in the federal government has led to what might be called a subpractice of law in Washington, D.C.—influencing agency decisions.

Oversight

Far from being considered an illegitimate offspring, agencies are now fought over by their "parent" branches of government. The above-mentioned Presidential Executive Orders on regulation have resulted in a situation where the President (through OMB) effectively controls the policy-making of all Executive Branch departments and agencies. Moreover, citing the Supreme Court's decisions outlawing legislative veto of agency rulemaking, the Reagan Administration (supported by an ABA Board of Governors Resolution at the recent Midwinter meeting)¹² has bruited the idea that independent agencies can rightfully be brought under the sweep of these orders.¹³ The district court

decision in the recent Gramm-Rudman litigation, in dicta, hinted its receptivity to this view by noting that "[i]t is not as obvious today as it seemed in the 1930's that there can be such things as genuinely 'independent' regulatory agencies."¹⁴ However, the Supreme Court in affirming the lower court's decision took pains to add in a footnote that "no issues involving such [independent] agencies are presented here."¹⁵

In a sense, we have come full circle, with new arguments coming to the fore that independent agencies enjoy no particular constitutional status and that all agencies should be seen as within the Executive Branch and thus subject to Presidential control. Congress has said "not so fast." Although it has been willing to grant OMB sweeping power over *all* agencies' actions involving paperwork (under the Paperwork Reduction Act of 1980), Congress has shown increasing jealousy over "its" independent agencies. Congress has granted several of these agencies independent litigating authority and exemptions from OMB clearance of legislative testimony, and various congressional committees have decried perceived OMB "interference" in agency regulatory initiatives. This power struggle concerning the nature of executive and legislative oversight of agency policymaking is at bottom a constitutional law question—but it is one of great significance to all practitioners of administrative law.

Judicial Review

Nor is the Judicial Branch completely on the sidelines. Not only have federal courts become arbiters of some of these power-sharing disputes, judicial review of agency action generally has assumed an importance and regularity beyond imagination forty years ago. Rare is the major agency regulation that escapes court challenge. Indeed, as the Administrative Conference has documented, "races to the courthouse" have become frequent spectacles.¹⁶

In this instance, the APA provisions on judicial review are only partially to blame. Section 706 spells out a scope of judicial review test that is, on its face, quite deferential. To be found unlawful, an agency action must be either unconstitutional, *ultra vires*, procedurally unlawful, unsupported by substantial evidence or "arbitrary, capricious [or] an abuse of discretion." Nevertheless, courts have not only opened the doors to more litigants by limiting standing, ripeness, and reviewability barriers, they have basically turned the section 706 test into one that can be summarized as: "was the agency action reasonable or

unreasonable?" Indeed, as the ABA Administrative Law Section's recent attempts to parse the true meaning of section 706 shows,¹⁷ courts have made use of a variety of arrows in their quiver when seeking to shoot down agency action.

Openness

And what of *public* oversight? The array of openness laws in the 1970's has resulted in a large window into agency activities. Agency records are available, their advisory committees must meet publicly, collegial commissions must meet "in the sunshine," secret, *ex parte*, communications to agencies about proceedings in progress are questionable and often illegal, and top agency officials have to disclose their finances to the public. Has this openness gone too far for the government's own good? While, in most cases, administrative law practitioners and students would agree that the openness of the last fifteen years has been largely beneficial (partly perhaps because these same people are, after all, in a sense, "consumers" of this "good"), a bit of a backlash has begun to set in.

In administrative law . . . there is a growing dissatisfaction with the high costs of adversary procedures, both to agencies and the public. Accordingly, agencies have become increasingly interested in developing alternative dispute resolution (ADR) techniques.

The Administrative Conference, despite a predominance of agency members, has through the years been a bastion of openness, urging a stronger Freedom of Information Act, more disclosure of *ex parte* communications in rulemaking and greater public participation in all types of agency proceedings. However, in recent years, the Conference has warned against overly inflexible application of the openness provisions of the Federal Advisory Committee Act, urged greater protection of confidential business information under the FOIA, and urged that the government in the Sunshine Act be loosened so as to allow agency members to have preliminary discussion of budgetary matters or legislative proposals in private.¹⁸ The Nuclear Regulatory Commission has taken this cue and proposed restrictive amendments to its sunshine procedures that provoked such controversy within the legal community that it decided to await the outcome of an

ABA Administrative Law Section Report on the matter.¹⁹

Alternative Procedures for Dispute Resolution

In administrative law, as in other branches of law, there is a growing dissatisfaction with the high costs of adversary procedures, both to agencies and the public. Accordingly, agencies have become increasingly interested in developing alternative dispute resolution (ADR) techniques. Agencies have begun to use arbitration, mediation, mini-trials, telephone hearings and other techniques to avoid the strictures of formal trials to adjudicate some types of cases. The Administrative Conference has been a leader in studying these techniques and urging their use where appropriate.²⁰

In the rulemaking area, some agencies have found that increasing contentiousness has prolonged proceedings and has made court challenges to rules the norm rather than the exception. To help meet this problem, the Administrative Conference in 1982 advanced the technique known as "negotiated rulemaking." Under this procedure, an agency faced with a regulatory problem brings together representatives of affected parties to negotiate a rule in face-to-face meetings. Participants in the negotiations have an incentive to cooperate because of the savings if litigation can be avoided. Moreover, they know that failure to achieve some consensus on a proposed regulation will result in the agency writing the rule itself. This experimental procedure offers the hope, at least in some instances, of avoiding seemingly endless court battles over agency regulations. It was our view that real dollars in the form of transaction costs to both the government and private parties could be saved whenever a consensual solution could be arrived at prior to the hardening of the positions. Therefore, our original 1982 recommendation on negotiated rulemaking trumpeted this concept and suggested some guidelines for the convening and conducting of such a proceeding. In 1985 we assessed the experience thus far.²¹

We found that the Federal Aviation Administration (FAA) and the Environmental Protection Agency (EPA) have pioneered the use of negotiated rulemaking, with notable success. The FAA has used the technique to replace an outmoded regulation concerning flight and rest time requirements for domestic airline pilots that was on the books for over thirty years and that required thousands of pages of interpretation. The negotiating committee assembled by the FAA consisted of representatives of airlines, pilot

organizations, public interest groups, and other interested parties. The new rule simplifies the flight and rest time requirements. The FAA says that it permits more flexibility in scheduling while ensuring that flight crews receive adequate rest between assignments. Thus far there has been no challenge to the new rule in the courts.

A similar success story can be told about the EPA. The EPA has adopted a negotiated rule on nonconformance penalties for certain vehicles not meeting Clean Air Act standards. A second negotiated rule concerning emergency exemptions from pesticide regulations is pending before the Administrator of the EPA. The agency has begun a third negotiated rulemaking proceeding aimed at protecting farmworkers from unsafe exposure to pesticides.

Former EPA Administrator William D. Ruckelshaus has said: "Conducting environmental business through attack and counter-attack, suit and counter-suit, is wasteful, expensive, and exhausting."²² Though the negotiated rulemaking process is not appropriate for every regulatory problem, the experience of the FAA and the EPA shows that "reg neg" can sometimes work to reduce this waste and expense. I believe that federal regulatory agencies should be urged to encourage the parties within their jurisdiction to collaborate in finding creative solutions to regulatory problems. The negotiated rulemaking experiment is showing that cooperation between the public and private sectors can pay valuable dividends in the form of better government.

Conclusion

It is wise to remember that in administrative law, as in other fields of law, procedural tussles usually reflect disagreements over substance. This is as true in the 1980's as in the 1940's. Questions concerning separation of functions, scope of judicial review, openness and public participation, centralized executive oversight, or the need for alternative techniques for dispute resolution, usually are brought to a boil by interest groups and their lawyers who make it their business to try to influence or convince agencies. That is why it is important for administrative law reformers to try to stay a step ahead by developing new approaches to decision-making.

We are fortunate, however, to have in the APA a stable framework to guide us all. One example may suffice to show how important this is. A major substantive issue of the 1980's is the extent to which "deregulation" should proceed in various health, safety and economic regulatory contexts.

The movement toward deregulation began in the Ford Administration, accelerated in the Carter Administration and has been made a top priority of the Reagan Administration, but it still has its detractors. So, in the early 1980's when several agencies attempted to repeal regulations, procedural challenges were mounted. After a series of lower-court skirmishes, the issue finally came to the Supreme Court in the context of the Department of Transportation's attempt to repeal its regulation requiring auto manufacturers to install airbags or automatic seat belts in all new cars.

The Supreme Court found that the DOT action was unlawful primarily because the Department had failed to consider alternatives to complete rescission. But, of more long-range importance, the Court expressly held that promulgations of new rules and repeals of existing rules are subject to the same standard of judicial review, and that both types of agency action require the agency to "examine the relevant data and articulate a satisfactory explanation for its action . . ."²³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, ___ U.S. ___, 103 S. Ct. 2856, 2865-66 (1983).

This decision, while perhaps initially upsetting to the Administration, was "policy neutral" in that it treated deregulatory and regulatory actions the same. The decision was consistent with the APA's definition of "rulemaking" as "agency process for formulating, amending or repealing a rule," 5 U.S.C. § 551(15). Moreover, once the Supreme Court reaffirmed the ground rules, agencies knew what steps to follow to repeal or amend a rule, and reviewing courts have applied the same "hard look" to agency regulatory and deregulatory actions alike. The result has been that, while some deregulatory actions have been overturned by the courts, a substantial number have been approved.

This is but one indication that, as with our Constitution, we also have a "living APA" that can still provide solid answers to many of the questions invented by today's administrative lawyers. We should remember this, and occasionally pause in our quest for new approaches to fairness and efficiency to be thankful that our forty-year-old roadmap still basically shows us the way.

FOOTNOTES

¹Root, "Public Service by the Bar," *Address of the Presidents*, Report of the 39th Annual Meeting of the American Bar Association, Chicago, Ill., p. 355, 368 (1916). As cited by Williams, *Fifty Years of the Law of the Federal Administrative Agencies—And Beyond*, 29 FED. BAR J. 267 (1970).

²*Message from the President of the United States Returning without Approval the Bill (H.R. 6324) Entitled, "An Act to Provide for the more Expeditious Settlement of Disputes, and for other Purposes*, H. Doc. 986, 76th Cong. 3d Sess., pp. 2-3.

³*Final Report of the Attorney General's Committee on Administrative Procedure* pp. 11-17 (1941). Printed as S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

⁴For an illuminating history from the leading figure in this process, see Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219 (1986). This entire volume of the VIRGINIA LAW REVIEW commemorates the 40th anniversary of the APA.

⁵See Lubbers, *Federal Agency Adjudications: Trying to See the Forest and the Trees*, 31 FED. BAR N & J 383 (1984).

⁶Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEXAS L. REV. 1132, 1144 (1972).

⁷Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1315 (1972).

⁸1972-73 Annual Report, Admin. Conf. of the U.S. [hereafter ACUS] 2.

⁹Associated Indus. of New York State v. U.S. Dep't of Labor, 487 F.2d 342, 345 (2d Cir. 1973).

¹⁰ACUS Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability*, 1 C.F.R. § 305.72-5 (1986).

¹¹ACUS Recommendation 76-3, *Procedures in Addition to Notice and the Opportunity for Comment in Informal Rulemaking*, 1 C.F.R. § 305.76-3 (1986).

¹²Section of Administrative Law, ABA, Report to the House of Delegates (resolution 100, passed Feb. 10, 1986). See Strauss and Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 AD. L. REV. 181, 206 (1986).

¹³See 4 Inside the Administration No. 8 (Feb. 22, 1985) for a report that OMB officials believed they have the legal authority to do so.

¹⁴*Synar v. U.S.A.*, 626 F. Supp. 1374, 1398 (D.D.C. 1986).

¹⁵*Bowsher v. Synar*, ___ U.S. ___, 54 U.S.L.W. 5064, 5067 n.4 (U.S. July 7, 1986).

¹⁶ACUS Recommendation 80-5, *Eliminating or Simplifying the "Race to the Courthouse" in Appeals from Agency Action*, 1 C.F.R. § 305.80-5 (1986).

¹⁷See Lein, *Federal Scope-of-Review Standards: A Preliminary Restatement*, 37 AD. L. REV. 95 (1985). A revised "restatement" will be published soon by the Administrative Law Section.

¹⁸See the various ACUS recommendations codified in 1 C.F.R. Part 305 (1986).

¹⁹See Croce, *Negotiation Instead of Confrontation*, 11 EPA JOURNAL No. 3 at p. 23 (April 1985) (quoting keynote address to the Conservation Foundation's Second Annual Conference on Environmental Dispute Resolution).

²⁰ACUS Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 FED. REG. 25643 (July 16, 1986).

²¹See Perritt, *Analysis of Four Negotiated Rulemaking Efforts*, 1985 ACUS 637.

²²50 FED. REG. 20889 (May 21, 1985) (proposed rule change); 12 Access Rept's/FOI No. 3 (Jan. 29, 1986) (decision postponed).

²³*Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

