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Judicial Review of Administrative Action

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JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

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I. Administrative Agencies in the United States

In drafting the Constitution, the Framers attempted to prevent the abuse of state power by apportioning it among three branches of government. The emergence of administrative agencies presents an embarrassing variation to the separation of powers that was the genius of the original constitutional plan, because, in a single organizational entity, the capacity to legislate rules, to implement those rules, and to penalize individuals who do not follow those rules may be combined.

To guard against the dangers inherent in this admixture of functions, each of the three traditional branches of government has developed mechanisms to restrain the "fourth branch". The tripartite functions of administrative agencies are thus subjected to tripartite controls. For example, the legislature can limit agency activity by appropriate language in the authorizing statute, and by monitoring agency performance in appropriation and oversight hearings. The executive branch can exercise the supervisory power commanded by a bureaucratic superior, at least over agencies that are not "independent," and even over independent agencies there is executive budget control. Finally, the judiciary can review agency decision making to ensure conscientious consideration of the issues within the authority of the agency, and a modicum of logical quality in the ultimate decision.

This paper focuses on the aspirations, the mechanics, and the practical limits to the third--the judicial--check on administrative action. My reason for discussing this subject with a British audience was well expressed by David Williams, President of Wolfson College, Cambridge,

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*/ U.S. Court of Appeals for the District of Columbia. This article first appeared in Justice for a Generation (West Publishing Co., 1985), a collection of papers presented at the 1985 meeting of the American Bar Association, London Sessions. It is reprinted here by permission.

when he referred to the 1957 report of your Franks Committee to point out the benefits of international cross-fertilization of ideas: Although "translation of the [administrative] practice of one country into the procedures of another is not likely to be appropriate, . . . since the basic issue, the relationship between the individual and the administration, is common, there will continue to be advantage in comparative study". 1/

II. The Aim of Judicial Review

The purpose of judicial review is to uphold the rule of law so that the aggregated and tripartite powers of an agency are not subject to abuse. Admittedly, agency personnel have discretion in choosing how to carry out their assigned tasks; some freedom of action is essential if the agency is to perform its duties in a way that best achieves the goals Congress set out when it established the agency in the first place. Yet the purview of agency expertise is limited by statutes and by constitutional requirements of due process.

The trick to judicial review, then, is to supervise agencies closely enough to make sure that they are doing their job but not so closely that courts do the agencies' job for them. In the United States, courts have gone much further than the requirements of British (and even Canadian) notions of "natural justice" and the limited duty to give reasons, and have required agencies to state their factual findings and to reason to defensible conclusions. The requirement of findings and conclusions serves two purposes, one procedural and one substantive. From a procedural standpoint, the requirement ensures that agencies evaluate the available evidence, apply the governing law, and think their way to a conclusion. From a substantive standpoint, findings and conclusions provide a basis for meaningful judicial review.

Because the objective of judicial review is to get the agencies to do their jobs, a reviewing court will not infer findings or supply a rationale not employed and cited by the agency. If it were otherwise, courts would invade

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1/ Williams, The Donoughmore Report in Retrospect, 60 Pub. Admin. 273, 284 (1982).

the sphere reserved by Congress for the agency and would depart from the sphere of their own expertise.

An analysis of judicial review produces a "summing up" of all the rules of administrative law, both procedural and substantive, for if an agency violates any of the fundamental rules, the agency action is sure to be challenged and ultimately nullified by the courts.

III. Standards of Review by Type of Agency Action

Under the Administrative Procedure Act of 1946, courts evaluate agency decision making under two general rubrics. Review of informal rule making is governed by the "arbitrary and capricious" standard, while review of agency adjudication and formal rule making is governed by the "substantial evidence" standard of review. Under the latter standard, the agency must compile a paper record, and its conclusions must be supported on consideration of the record as a whole, including the evidence against the agency's position as well as that in support. "Substantial evidence review" thus holds the agency to a stricter standard of performance.

Notwithstanding the superficially equal treatment of all informal rule makings on the one hand, and all adjudications and formal rule makings on the other hand, precedents pertaining to one agency or function are not necessarily transferable to another. In practice, courts apply variable values and standards to different agencies, even to different functions in the same agency. The reason for this is that agencies perform at least six different functions, each of which merits more or less deference to agency expertise, subjects individuals and businesses to more or less risk of arbitrariness, and is more or less susceptible to judicial review after the fact. A court will review activity within each function with the purpose of that function in mind.

The functions may be isolated as follows: (1) simple enforcement calling for sanctions, [e.g., orders issued by the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC)]; (2) rate making and licensing [e.g., that performed by the Interstate Commerce Commission (ICC), the Federal Energy Regulatory Commission (FERC), and the Federal Communications Commission (FCC)]; (3) environmental and safety regulation, [e.g., rules promulgated by the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA)];

(4) the granting of benefits, loans, grants, and subsidies by such agencies as the Department of Health and Human Services (HHS), the Department of Housing and Urban Development (HUD), and the Veterans Administration (VA); (5) the inspecting, auditing, and certification of potentially dangerous facilities and equipment performed by agencies like the Nuclear Regulatory Commission (NRC) and the Federal Aviation Administration (FAA); and (6) policymaking and planning such as that undertaken by the Civil Aeronautics Board (CAB), the NRC, and HHS. 2/

IV. How the Court Goes About It: The Method of Evaluating Agency Action

In spite of the different functions reviewed, our procedure is--or should be--a four-step analytic process. Although thousands of pages have been written about it, the essence of judicial review can be distilled into four simple stages:

1. Was the action taken within the agency's powers under its authorizing statute?

2. Were the parties accorded procedural due process, that is, notice, followed by an appropriate opportunity either to comment or to participate in a hearing?

3. Was there evidence (substantial evidence in an adjudicatory proceeding or formal rule making on the record) to support the agency's action?

4. Was the rationale by which the agency reached its results logical; in other words, was there a connection between the evidence adduced and the conclusion reached by the agency that is both discernible and defensible?

Understand these four steps, and you understand judicial review.

In reviewing an agency's decision for authority, procedural due process, evidentiary support, and cogent

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2/ Verkuil, The Emerging Concept of Administrative Procedure, 78 Colum. L. Rev. 258, 294-303 (1978).

reasoning, a court should not substitute its view for the agency's judgment, even if, as is not uncommon, there is substantial evidence to support either of two inconsistent conclusions. Judicial restraint should be the order of the day. As we put this standard in more than one case, "while we may not have reached the same conclusion the Commissioner did if we were to decide the matter ourselves, there need be only a rational nexus between the facts found and the decision made to sustain the agency's determination".

My formulation of the appropriate inquiry is, I submit, simpler to execute and less intrusive than that of some of my colleagues on the District of Columbia Court of Appeals. I am inclined to agree with Jack Beatson, Fellow and Tutor in Law of Merton College, Oxford:

> [T]he dispute between members of the District of Columbia Circuit Court of Appeals . . . revolved around the question of whether judges determine the rationality of a decision by "steeping" themselves in the technology or by requiring more and more elaborate procedures. Neither approach seems particularly palatable. The first deprives the agency of a substantial role in the decision on the merits, while the second invites the high costs of delay and the distortion of issues as well as indirect interference with the determination of the merits of the case. 3/

The wisdom of judicial restrain becomes evident when we see how judicial review works out in practice.

V. Current Specific Issues

Deregulation

President Reagan took office in January 1981, with the idea that we could no longer look to government as the solution to our problems; in many instances government was the problem. Accordingly, in the truck, railroad, and airline transportation industries, agency rate making and regulation is being scaled back drastically (or eliminated entirely, in the case of domestic airlines).

3/ Beatson, A British View of Vermont Yankee, 55 Tul. L. Rev. 435, 446(4).

The President's deregulatory initiatives have led to some interesting paradoxes. In the case of the Civil Aeronautics Board, for instance, more administrative effort has been expended trying to phase out the agency than was found necessary to install it originally. Moreover, it is surprising to observe who are among the most vehement opponents of deregulation: those who prefer not to feel, but to view from a sheltered industry the cold winds of competition elsewhere.

Some of these opponents have successfully sought the aid of courts to block rescission of previously adopted regulations. In Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., the Supreme Court held that the National Highway Safety Administration's attempt to rescind a regulation mandating passive restraints in automobiles was subject to the same standard of review as would be applied to a regulation to require such restraints in the first place. The court in State Farm vacated the judgment of a panel of our court and instructed us in turn to remand to the agency for further proceedings. In Public Citizen and Center for Auto Safety, at the behest of a public interest (not industry) group, a similarly constituted panel of our court held that the same agency's suspension of a tire treadwear grading standard was "arbitrary and capricious" and went so far so to reinstate the standard.

While litigants in the two cases just mentioned sought judicial review to block agency attempts to reduce the burden of regulations, other litigants have invoked the jurisdiction of our courts to compel agencies to embark on regulatory campaigns. Environmentalists, for example, sued the Interior Department under Secretary Watt and the Environmental Protection Agency under Commissioner Gorsuch, demanding the exercise of enforcement discretion to their liking. But perhaps the most controversial example of this stratagem is Chaney v. Heckler, in which a divided panel of our court held that the administration of drugs in lethal quantities to execute condemned prisoners violated the "misbranding" and "safety and effectiveness" provisions of the Food, Drug and Cosmetic Act. The plaintiffs apparently wanted a label similar to that required on cigarette packages--"The Surgeon General has determined that this drug may be dangerous to your health". Not surprisingly, the Supreme Court granted certiorari and will hear argument this coming term. [Ed. note--The Supreme Court has since overruled.]

The Breakup of AT&T and Judicial Review of Consent Decrees

Perhaps the most widely publicized "deregulatory" act in recent memory was the government's entry into a consent decree with American Telephone and Telegraph (AT&T), which removed restrictions imposed on AT&T by a previous consent decree. The earlier consent decree essentially limited AT&T to the provision of common-carrier communications services.

In exchange for the right to enter the fast-growing information and data-processing fields, AT&T agreed to divest its local telephone operating companies. As a result, there is now a new competitive situation, internationally, nationally, and regionally, as giant AT&T attempts to compete against discount long distance carriers and to establish a bridgehead in the market for microcomputers. Regulatory adjustments will spawn new controversies with new antagonists, and with old antagonists in new positions.

The AT&T breakup revives troubling questions about judicial review of consent decrees. Ordinarily, extra-judicial settlements of outstanding litigation are a welcome alternative to an expensive and lengthy trial, but when one of the parties is the United States, the possibility of unilateral executive lawmaking is raised. For example, an industry or public interest group may sue, reach agreement with a regulatory agency, and persuade a court to enter a consent decree settling the suit. The decree may be binding on the agency forever, govern all other parties positioned to raise similar issues, and severely constrict agency discretion granted by statute. If courts do not engage in a searching review of these consent decrees, "sweetheart deals" between a sympathetic administration and a public interest group or corporation may take place, as apparently happened in the early 1950's with AT&T, and in the early 1970's with International Telephone and Telegraph. If a court does engage in searching review--as District Judge Harold Greene in our circuit did when he reviewed the proposed AT&T consent decree in a meticulous 103-page opinion--the court of necessity becomes both super-legislature and super-agency, an unelected and unguided guardian of the "public interest".

Legislative Veto

Unreviewed consent decrees present the risk that the executive branch will unilaterally bind the government

as effectively as any piece of legislation; legislative veto provisions raise the similar risk that the legislative branch will unilaterally exercise executive or judicial power or take legislative action without the required presentation of legislation to the president.

The Supreme Court's holding in Immigration and Naturalization Service v. Chadha--that a provision authorizing one House of Congress to veto the attorney general's suspension of an alien's deportation (sic)--was prefigured by two decisions in our circuit that also held various legislative veto provisions unconstitutional. These holdings stand in sharp contrast to the unquestioned constitutionality of acts in Britain providing that rules be laid before one or both Houses of Parliament and that such rules be annulled either automatically or by resolution. The different constitutional result in our countries stems from the importance of the constitutionally prescribed separation of powers principle in the United States.

The Chadha decision left open a number of questions. Because over 200 statutes contain legislative veto provisions, one immediate question is whether these unconstitutional provisions are severable or whether whole statutes must be invalidated. If a statute does not state that unconstitutional sections are severable, there will inevitably be a series of challenges to agency authority on the theory that the nonseverable legislative veto clause invalidates the agency action. If the legislative veto clause is severable, however, the remainder of the statute exists with "no strings attached". Conceivably, there could now be an excessive and therefore unconstitutional delegation of legislative power. Even assuming that the severability problem is satisfactorily resolved, one wonders what Congress can do to reassert its authority over administrative agencies. Before Chadha, Congress had been moving in the direction of reducing agency discretion by providing for legislative veto of overzealous agency action. With a similar goal, Senator Bumpers went so far as to propose de novo court review of agency action. After Chadha, Congress is even more inclined to assert control, but what some thought its most effective tool has been taken away. Some academics suggest that Congress could mimic the legislative veto by conditioning the legal effect of a regulation on Congress's passage of a confirmatory law (presented to the President) pursuant to expedited internal rules. Although feasible, this approach would require Congress to reopen the uneasy compromise reached over its internal procedures and devote much more attention to proposed regulations. It remains to be

seen whether Congress values the legislation veto sufficiently to adopt this more costly surrogate.

Risk Assessment

Another question deserving the attention of Congress, as well as the consideration of agencies and courts, is how risks of various governmental acts should be assessed and by whom. The nuclear industry presents this problem in perhaps its most acute form.

Broadly written congressional enactments provided the occasion for judicial activism in recent years. In People Against Nuclear Energy, for example, the Supreme Court reversed a panel of our court for requiring an environmental impact statement assessing the fears local residents might have about the reopening of a nuclear power plant. Likewise, in Vermont Yankee, the Supreme Court twice reversed our court for usurping the policymaking prerogatives reserved for the political branches of government.

Regulation of nuclear power, like selection of energy sources in general, necessitates resolution of complex issues far beyond the technical capacity of most judges. Aside from the lack of facilities, lack of expert staff, inadequate training, and institutional inability to mandate public expenditures, judicial forays into delicately woven regulatory schemes are episodic--they disrupt the agency's attempt to manage its affairs in a coordinated fashion.

Rather than arrogate policy decisions for itself, the judiciary would be better advised to require agencies to assess risk in an appropriate manner, assuming that risk assessment is authorized by Congress. Commendably, the executive branch has instituted its own regulatory analysis review program pursuant to President Reagan's Executive Order 12,261. Although the agency responsible for implementing the program, the Office of Management and Budget, can review only a small percentage of regulations, Harvard Professor Richard Stewart reports that "[i]ts analysts have often identified unnecessarily costly or clumsy elements in

proposed regulations and secured useful modifications in them". 4/

Sound decision making suggests that agencies consider total risk; that is, the sum of the risks manifest at each stage of the process by which a service or good is produced. By comparing nuclear energy to its real, available alternatives instead of some imaginary cheap, safe, and inexhaustible energy source, even courts might conclude that their penchant for remanding to agencies for further fact finding has jeopardized America's energy security. I hasten to add, however, that the most enlightened cost/benefit analysis must remain unavailing in many fields because Congress has laid down an all-or-nothing approach. Accordingly, agencies responsible for protecting the snail darter or banning carcinogens like saccharin must act oblivious to the costs their regulations impose on the economy or the consuming public.

VI. The Problem of Judicial Activism, or "The Seizure of Abandoned Swords and Purses"

The problem of snail darters and carcinogens, however, is the exception and not the rule. In the last few decades, Congress has deliberately passed the difficult decisions to the judiciary far more often than it has legislated an overly rigid rule. The most acute issue facing reviewing courts today is what they should do when the two political branches leave the task of policy making to the unelected members of the judiciary.

By abdicating its duty to legislate public policy, Congress makes the position of the judiciary untenable. Without congressional guidance, how can a court tread the line between deference to agency decision making and correcting deviations from congressionally mandated policy? The courts are supposed to do both. Where the line is drawn will decide many a case, but line drawing is frequently plain policy making.

By identifying the source of administrative law's current affliction, we have also identified where lies its cure. Reform of the administrative process is primarily the

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4/ R. Stewart, The Limits of Administrative Law 19 (June 1983) (unpublished manuscript).

duty of Congress and the agencies. The ability of the courts to reform the agencies is limited by the nature of their review function only, and by statute (as we saw in Vermont Yankee and People Against Nuclear Energy). Moreover, because courts can decide only "cases and controversies" under our Constitution, judicial reform would be piecemeal, costly, and slow in coming--even if it did not violate statutory and constitutional norms.

The inability of courts to reform the administrative process underscores the theme of this paper--the necessity of judicial restraint. Only by keeping within the bounds set by the Framers, Congress, and our institutions can judges keep faith with the oaths of their office and, by refusing to exercise the prerogatives of Congress and executive, force them to live up to their constitutional obligations as well.

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CORRECTION

I have just received the Spring '85 issue of the Journal of the NAALJ, and noted on page 50 a reprint of the Interim Report on Cases Heard by UI officers . . .

[T]he caseload for Missouri UI referees should be 4-5 per day, 21-25 per week. The discrepancy in the figures published may be a result of double-counting of the caseload for those referees who travel to hearings. For those referees, they may very well hear up to eight cases in one day, 42 per week, but they also would, in alternate weeks, have a week with no cases at all, spent writing the decisions. For those referees stationed at one location, cases typically are heard one-half day and then written one-half day, five cases per day, 25 per week, every week.

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