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CHAIRMAN'S MESSAGE



ANTONIN SCALIA

These are (to use the phrase which, as I understand it, the Chinese wish upon someone as a curse), “interesting times” for those of us who practice or teach in the field of administrative law. What seemed, during the days when I was in law school, an obscure and arcane area of practice is now often the focus of articles in the daily newspapers and popular journals. In the early 1970s, when I served for a time as Chairman of the Administrative Conference of the United States, it was difficult

to attract any congressional attention to major problems of administrative procedure. Indeed, as I recall, many of those congressmen who knew about the APA persisted in calling it the Administrative Procedures Act. The *Washington Post* ran an article during those years on “do-nothing” units of Congress—committees and subcommittees that served as sinecures for staff members devoted to “constituent-care” or other political purposes; high on the list was a subcommittee charged with responsibility for matters of administrative procedure.

What a change there has been! Committees with responsibility for procedural reform are at the center of the political stage, and from congressional lips there falls not merely a correct pronunciation of the Administrative Procedure Act (APA) but a whole new vocabulary of what might be called admin-chic—“regulatory impact analysis” (or, for those really *au courant*, simply “RIA”), “periodic review,” “legislative veto,” “sunset,” “two-stage rulemaking,” “Bumpers,” “Baby Bumpers,” “regulatory budget,” etc.

It is a period of ferment that can only realistically be compared with the era that gave birth to the APA some thirty-five years ago. The Supreme Court described that Act, not long after it was passed, as legislation that “settles long-continued and hard-fought contentions, and enacts a formula upon which opposing social and political forces have come to rest.”¹ That description was repeated as recently as 1978,

¹Won Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

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in the *Vermont Yankee* case;² but it should be apparent today that the state of rest has become disturbed. Expanding upon more limited efforts by his two immediate predecessors, the President has placed in effect what might be considered a mini-APA by Executive Order 12291, applicable to rulemaking throughout the executive branch. And committees of both houses of Congress are in the midst of considering major revisions of the APA itself, which appear certain to be enacted this year or next in some form.

It is interesting to compare the procedural reform movement of 1981 with its 1946 counterpart. Both followed an era of extraordinary expansion in federal agency power and activity. The APA dealt with the NLRBs, CABs, FCCs, SECs, and FDICs created by the prior decade of the New Deal. The Regulatory Reform Acts of 1981 deal with them plus the EPAs, OSHAs, CPSCs, NHTSBs and CFTCs created during the regulatory explosion of the 1970s. Both represent, it is fair to say, a reaction against what were (or are) regarded as administrative excesses of the recent past.

Both reforms required a lengthy incubation period, and changed form considerably over the course of their development. The movement that culminated in the APA began with proposals for an administrative court that appear as early as 1933;³ an early (and still highly "judicialized") version of the act, the Logan-Walter bill,⁴ was passed by both houses of Congress in 1940, only to be vetoed by President Roosevelt.⁵ By the time the legislation was finally enacted in 1946, its legislative history, officially published in a Senate Document compiled by the Judiciary Committee,⁶ was deceptively brief, because so many of the important hearings had been held in earlier sessions, with respect to different bills. The Regulatory Reform Act of 1981 (or 1982) will have undergone a similar process of gradual evolution. It is part of a legislative movement that can be traced back to 1975 and 1976, which saw proposals subjecting all agency regulations to legislative veto⁷ and to "sunset review."⁸ Those first-conceived features, like the administrative court in the case of the APA, may well not appear in the final legislation.

²*Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 523 (1978).

³S. 1835, 73d Cong., 1st Sess. (1936).

⁴H.R. 6324, 76th Cong., 3d Sess. (1940).

⁵86 CONG. REC. 13842 (1940).

⁶S. Doc. No. 248, 79th Cong., 2d Sess. (1946) (hereinafter cited as Legislative History).

⁷H.R. 3658, 94th Cong., 1st Sess. (1975).

⁸S. 2925, 94th Cong., 2d Sess. (1976).

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Both reform movements sought relief from agency excesses in the courts, through proposals for more intensive judicial review. (This is curious with respect to the current reform, since in other fields Congress appears displeased with the performance of the Third Branch, and is considering elimination of federal-court jurisdiction.)⁹ And finally (but this is not at all curious), both then and now the new proposals have received at best half-hearted support from the agencies to whose procedures they are directed.

But there are two differences between the reforms of 1946 and 1981 that are, it seems to me, important and perhaps portentous. First, the degree of Executive involvement in their formulation. While one cannot avoid the impression that the Executive of yore was not eager, no more than today, to have its procedural options curtailed, when the inevitable arrived it at least saw to the development and presentation of a thoroughly documented, expert analysis of the major issues, which became the focus of the congressional debate. One reason the President gave for vetoing the 1940 bill was to enable consideration of the still-pending report of the Committee on Administrative Procedure appointed by Attorney General Jackson, at the President's direction, earlier that year.¹⁰ The committee's Final Report was issued about a month later¹¹ and, it is fair to say, dominated subsequent consideration of the subject. Individual agencies also took an active role in the legislative process: in connection with the 1941 hearings, at least thirty-five separate agencies made oral or written presentations;¹² two rounds of agency comments were again solicited by the Judiciary Committees in 1945;¹³ and in the 1945 House Judiciary Committee hearings, almost two days of testimony were devoted to Commissioners of the ICC.¹⁴

The current situation presents a stark contrast to this Executive leadership and individual agency involvement. While the last three Presidents have spoken in favor of regulatory reform—and the last two campaigned in favor of it—almost none of the features of the present bills represent Executive-generated proposals or initiatives; and some, such as the legislative veto of rulemaking and the Bumpers Amendment concerning judicial review, have been opposed by successive administrations. (So-called “regulatory impact analysis” is, to be sure,

⁹*See, e.g.*, the following bills currently under consideration (all 97th Cong., 1st Sess.): H.R. 867 (abortion); S. 1647 (busing); H.R. 72 (school prayer).

¹⁰86 CONG. REC. 13943 (1940).

¹¹FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE (1941).

¹²Legislative History at 247.

¹³*Id.* at 248.

¹⁴*Id.* at 87–128.

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not only favored but was conceived of by the Executive—but not its embodiment in rigid statutory form.) No “administration bill” has been introduced, and the administration “version” circulated informally is obviously an ad hoc reaction to a legislative agenda congressionally prescribed. The degree of individual agency involvement in the process is suggested by a recent acknowledgement on the part of the Administrator of OSHA—surely one of the agencies most affected—that he was uninformed concerning the proposed increased formalization of rulemaking procedures.¹⁵ The difference between then and now in this regard may be entirely understandable; one would not expect a new Republican Administration to have as clear a position on these matters—or as much time to develop a position—as a Democratic Administration that had been in office (by the time the APA was enacted) for fourteen years. But the difference is nonetheless significant, and must suggest that the implications of the proposals for the agencies have not been as thoroughly considered.

There is another striking contrast between the APA and its pending modern revision. The APA was preeminently lawyers' legislation. The prime factor in its enactment was unquestionably the American Bar Association, which in 1933 had created a Special Committee on Administrative Law to work on the perceived problems of administrative justice.¹⁶ (That Committee may, by the way, be considered the ancestor of our Section of Administrative Law, which was founded in the year the APA was enacted. I am anxious to claim descent because it was an eminent group, including from its founding such giants in American law as Roscoe Pound and Felix Frankfurter.) The Logan-Walter bill vetoed by President Roosevelt in 1940 was an ABA proposal,¹⁷ as was the McCarran-Sumners bill that ultimately (with some revision) became the APA.¹⁸ The President of the ABA was the first witness in the 1945 House Judiciary Committee hearings,¹⁹ and an article by the

¹⁵Conversation with Thorne G. Aucter, sponsored by American Enterprise Institute, Washington, D.C., Sept. 25, 1981.

¹⁶For a description of the formation and activities of the Special Committee, see Legislative History at 63–66. The membership of the Special Committee through 1940 appears in *Administrative Procedure: Hearings on S. 674, S. 675 and S. 918 Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess. 937 (1941).

¹⁷See Legislative History at 64. President Roosevelt's veto message paid backhanded tribute to the role of the bar by noting that “a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal,” and prefers instead “the stately ritual of the courts, in which lawyers play all the speaking parts” and “technical rules of evidence in which the lawyers are the only experts, although they always disagree.” 86 CONG. REC. 13942–43 (1940). One sees in this the sharp pen of Attorney General Jackson.

¹⁸See Legislative History at 66.

¹⁹*Id.* at 48.

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next President of the ABA—read by the Clerk of the Senate at the request of Sen. McCarran—began the Senate debate.²⁰ On the government side, the legislative battle was also conducted by lawyers. The Attorney General's Committee on Administrative Procedure, whose 1941 report profoundly affected the ABA's ultimate position, was chaired by Dean Acheson and numbered among its members Francis Biddle (later Attorney General), Arthur Vanderbilt, Ralph Fuchs, Henry Hart and Carl McFarland (later Chairman of the ABA Special Committee). Its Director was the former Council Member of this Section, Walter Gellhorn.²¹ In the legislative process it was the Justice Department that enunciated the Administrations's position and coordinated the views of other agencies.²²

It is different with the Regulatory Reform Act of 1981. The ABA has, to be sure, had considerable influence in generating and shaping reform initiatives through its Commission on Law and the Economy, its Coordinating Group on Regulatory Reform and (I must modestly add) its Section of Administrative Law. But none of the proposals currently pending could remotely be described as an "ABA bill"; and business associations—in particular the Business Roundtable—have had at least an equivalent role in bringing this legislation to the floor. On the government side, the contrast is even more striking: It is the Office of Management and Budget rather than the Department of Justice that has taken the lead in coordinating agencies' views (insofar as that has been done) and presenting the Administration's position. And indeed, to the extent any major features of the present legislative proposals can be said to have originated with the Executive Branch, it is with the economists and managers at OMB who devised Exec. Order No. 12,291 rather than with the lawyers at Justice. To be sure, OMB has its own fine lawyers as well—and doubtless has made use of the legal talent of the Justice Department. But they have been at most the midwife, and not the mother, of reform.

This phenomenon is traceable, I think, to the fact that the impetus behind the current reform movement is less distinctively legal, and more commercial or economic, than it was in 1946. In the debate preceding adoption of the APA, concepts such as "unfairness," "bias" and "prejudice" played a prominent role. Those concerns are not entirely absent in 1981, but notions such as "overregulation" and

²⁰*Id.* at 295.

²¹For the membership of the Committee see FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE iv (1941).

²²*See, e.g.,* Legislative History at 249.

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"cost-effectiveness" are the rallying point. Such issues are not the lawyer's stock in trade.

It is not clear to me whether the reduced role of our profession in the current reform should be cause for satisfaction or concern. There is much to be said for the proposition that—just as war is too important to be left to the generals—administrative procedure is too important to be left to the lawyers. But that truth can be pursued to a fault. The fact is that even if the goals are commercial and economic, when they are sought to be achieved through *process* it is lawyers, rather than economists or businessmen, who are (or are at least supposed to be) the experts. They have, if nothing else, an intimate familiarity with the manner in which the process can be used or abused by their own kind. The job they did last time around was, after all, not bad. A thirty-five-year life span for a procedural "formula upon which opposing social and political forces have come to rest" is quite respectable in a field that has changed as rapidly as federal administration. There may be reason to fear that the product produced in 1981 will be less enduring.

The interest of the laity in administrative process, which now seems so flattering, may prove to be a bane. It is, come to think of it, extraordinary that a Congress bent upon major substantive change in the nature and scope of regulation would turn, not to the substantive statutes in question, but to the basic framework of administrative procedure. Early in this century, Sir Henry Maine called attention to the fact that substantive law is sometimes "secreted in the interstices of procedure."²³ It is a profound insight—and perhaps as dangerous as the Knowledge of Good and Evil. In recent years, we seem to have let the secret (expanded somewhat beyond Maine's original meaning) leak out beyond our legal fraternity, so that the world at large—yea, even the Business Roundtable—has lost its innocence, and realizes that the politically simplest way to alter substance is to alter process. I fear we must get used to having more players on our field—and perhaps to "interesting times" for administrative procedure into the indefinite future.

²³SIR HENRY MAINE, *EARLY LAW AND CUSTOM* 389 (1907).