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CHAIRMAN'S MESSAGE

Rulemaking as Politics



ANTONIN SCALIA

This is the last occasion on which, as Chairman of the Section, I will be provided this free space to hold forth upon subjects of my concern. I seize the opportunity to discuss a topic no less cosmic (given the regrettably limited cosmos of administrative procedure) than the relationship between rulemaking and democracy. It is a topic of some current relevance because, unless I miss my guess, we have entered a period in which the relationship will be probed and tested, if not precisely defined.

We can launch our inquiry from the certitude of one well established principle, echoed in case after case down through the years: Rulemaking is a quasi-legislative activity. Unfortunately, it is not at all clear what that means. In the words of Mr. Justice Jackson, which are as true (and as elegant) today as when he wrote them thirty years ago:

Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying “quasi” is implicit with confession that all recognized classifications have broken down, and “quasi” is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed. Jackson, J. dissenting, in *FTC v. Ruberoid Co.*, 343 U.S. 370, 487–88 (1952).

But whatever we mean by “quasi-legislative” in applying that term to rulemaking, it surely implies some element of what might be termed political discretion, not reviewable by the courts.

Let me state starkly what I think that means: An agency may make some decisions in rulemaking not because they are the best or the most intelligent, but because they are what the people seem to want. If I had to give you a quotation from a case to support that principle, I would frankly be at a loss to do so. But it has worked that way—and a good thing, too, unless you are comfortable with the notion that the many agencies charged with pursuing goals no more specific than “the public

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interest, convenience and necessity” are to do so in some isolated think-tank, without regard to what the public wants. When I say “what the public wants” I refer not to the latest Gallup poll, but to the manifestations of the popular will through the political process—the administration placed in office in the last election, the oversight and appropriations committees of Congress, the groups with political power (from Common Cause to the U.S. Chamber of Commerce) that appear before the agency and are listened to more closely than John Doe precisely because of their political power.

As I have said, this intrusion of politics into the rulemaking process is not to be found in the cases. The reason is that a number of jurisprudential devices have enabled it to have free play off the judicial stage. In recent years, however, the situation has changed. Several of the protective doctrines are now virtually defunct, and the rest are either enfeebled or else not readily applicable to new rulemaking initiatives. Moreover, the agencies’ internal ability to recognize and accommodate political factors has been impaired.

Ripeness and Standing. As recently as two decades ago, much of the agencies’ ability to operate as part of the political process was attributable to the doctrines of ripeness and standing. These enabled many rules to be issued with the practical assurance that they would never be subject to the rational, nonpolitical scrutiny of the courts. In the bad old days, when a rule was not considered “ripe” for review until enforcement was sought or threatened against a particular company, the individual or company aggrieved by a “political” determination would have to risk a penalty (by failing to comply with the rule) in order to get to court—and that was often not worth it.

But the doctrine of ripeness had no *special* utility for politically based judgments; it kept them out of court along with everything else. The doctrine of standing, on the other hand, was almost tailor-made to protect political discretion. It is rudimentary political science that slight harm, expense or inconvenience imposed upon a large, diffuse body of the population will generally not arouse effective political opposition. But diffuseness, expansiveness, lack of particularity was what the doctrine of standing was all about. In other words, it excluded from the courts *precisely* those interests that were likely to lose in a rulemaking proceeding with substantial political content—the potential hikers and campers who would be harmed by construction of a new ski-resort, to take a real-life example. *Sierra Club v. Morton*, 405 U.S. 727 (1972).

Insofar as federal rulemaking is concerned, legislative and judicial developments have rendered the doctrines of ripeness and standing significant obstacles to judicial review. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

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Rulemaking Discretion. I use this phrase in a newly coined, technical sense, signifying the rulemaking equivalent of prosecutorial discretion. The latter doctrine teaches that the Federal Trade Commission, for example, may choose not to proceed against a particular malefactor and no court (generally speaking) will say that it must. Moreover, if it chooses to proceed, no court will dismiss the enforcement action on the ground that there are many more important enforcement actions on which the agency should be spending its time. A similar principle applies in rulemaking. The rulemaking agenda—what an agency wishes to do and not to do, within the broad range of alternatives available under its charter—is up to the agency itself. It is a large and important area of political discretion.

Or at least it has been. Several developments suggest that this avenue is more narrow than it used to be. The protection of rulemaking discretion has rested largely upon the courts' practice of treating agency nonaction differently from agency action. The Administrative Procedure Act technically disavows any such distinction (*see* 5 U.S.C. §§ 551(13), 704), but it has been the common law of judicial review. There are some indications that the distinction is eroding. The District of Columbia Circuit has specifically rejected the proposition that refusal to commence a rulemaking proceeding, or failure to adopt a rule, is agency action "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and thus not subject to judicial review. *WWHT, Inc. v. FCC*, 656 F.2d 807, 818-19 (D.C. Cir. 1981); *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

Even if the distinction is maintained, however, it may be of significantly reduced value in the current era, when the direction in which the agencies' political judgment points is that of deregulation. Obviously, that will often require not merely inaction (failure to initiate a particular rulemaking, or failure to select a more restrictive manner of regulation) but the affirmative step of revoking existing rules. Thus, if the distinction between action and nonaction is made the only touchstone for the preservation of rulemaking discretion, the judgment whether or not to pursue a particular area or manner of regulation ceases to be a political judgment once regulation has been initially imposed. This seems the conclusion embraced by the D.C. Circuit in its recent decision concerning the National Highway Traffic Safety Administration's requirement for passive restraints in automobiles. *State Farm Mut. Auto Ins. Co. v. DOT*, D.C. Cir. No. 81-2220 (June 1, 1982).

The Arbitrary or Capricious Test. The last substantial device for preservation of the agencies' scope of political judgment review, which requires merely that the rule be "rational" on the basis of the justifications assigned by the agency. There are, of course, usually a number of

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possible "rational" dispositions, and the selection among them is often made on the basis of that nonanalytic societal preference that I have termed "political judgment." The courts make sure that the stated justifications support the course selected; but they do not prescribe which justifications (In fact, the D.C. Circuit has gone even beyond this, to assert that the revocation of a rule requires *stricter* judicial scrutiny than its initial adoption. *Id.*, slip op. at 47-50; *NAACP v. FCC*, No. 80-2416 (D.C. Cir. June 29, 1982), slip op. at 7.) must be used, and hence do not closely control the ultimate selection. When, for example, the FCC determined that the justification of predictability and stability warranted exempting existing licensees from its new ban on cross-ownership of newspapers and broadcast media in the same market (a political judgment if there ever was one), the Supreme Court held that an appellate court could not demand that the competing justification of diverse information sources be given controlling weight and the exemption be eliminated. *FCC v. National Citizens Ctee. for Broadcasting*, 436 U.S. 775 (1978).

There are increasing signs of a break-down in this last device for preserving scope of political judgment. More and more statutes abandon the "arbitrary or capricious" test entirely, and establish a stricter (and politically more constraining) "substantial evidence" standard of review. Even the "arbitrary or capricious" test itself is evolving towards greater rigidity, in the courts of appeals at least, as the "rationality" test finds itself supplemented by the fundamentally incompatible "hard look" doctrine. What may turn out to be a major new impetus in the same direction is, ironically enough, the handiwork of those who currently have the most to lose from restricting the agencies' political judgment—the deregulators. Executive Order 12291 and S.1080, the regulatory reform bill passed by the Senate, require that each agency rule represent the "least burdensome alternative" for the achievement of its objectives, and that it be accompanied by a cost-benefit analysis. Those requirements certainly represent sound administration. And properly understood (so that "burdens," "costs" and "benefits" include not just purely economic elements but also unquantifiable values such as aesthetic preferences, freedom from personal restraint, etc.) they are probably a fair description of what "nonarbitrary" action requires anyway. Moreover, neither the Executive Order nor the legislation invites the courts to enforce these requirements, but to the contrary explicitly make them unreviewable. The fact is, however, that these requirements foster a view of rulemaking as a more or less mechanical, value-free, nonpolitical exercise. And despite the exclusion of judicial review, judges do not think and write in another world. What comes to

be regarded, within the Executive and the Congress, as a requirement of sound administration will ultimately be reflected in the judicial application of the "arbitrary or capricious" standard as well.

Before leaving the subject of the devices that have insulated the agencies' political judgments from judicial scrutiny, I might note my suspicion that we have yet to feel the full impact of their elimination in producing a conflict between what is expected of the agencies by the political system and what is demanded of them by the courts. In the decade when all of these protective doctrines were gutted, the consumer and environmental movements—unusual alliances of individuals with interests so diffuse and remote that they would ordinarily not be politically effective—were in full flower. Their influence caused the agencies' political judgments to be less dominated by the more traditional and enduring interest groups, and to be more "rational" as judges are given to see rationality. (This is not meant to suggest that the policies supported by the consumer and environmental movements are analytically superior, but only that judges—like most of the nonentrepreneurial upper-middle class to which they belong—are prone to think so.) Should those unusual political alliances fade, as they seem to be doing, and their influence before the agencies decline, the divergence between the agencies' political judgments and the courts' analytic ones will be magnified, and the old protections of ripeness, standing, rulemaking discretion and limited scope of review will be more keenly missed.

Politically Insensitive Procedures. For the agencies to produce politically sound rules, it is not enough that the standard of review leave room for political judgment. The rulemaking process itself must permit the play of political forces that enables an intelligent political judgment to be formed. Here also we have seen debilitating change. The *sine qua non* of political accommodation, confidential negotiation, has been progressively eliminated. Most advisory committees have been abolished, and those that remain have been turned into public discussion groups through the Federal Advisory Committee Act, 5 U.S.C. app. Even confidential discussions among the members of the agency itself have been prohibited by the Sunshine Act, 5 U.S.C. § 552b. A panel decision of the D.C. Circuit has held all *ex parte* contacts in rulemaking to be prohibited, *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977). Though contradicted by a decision of another panel of the same court, *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977), it has induced some agencies voluntarily to abandon the practice. Or perhaps merely the zeitgeist has induced them to do so—for the smoke-filled room is certainly (if you will

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pardon the pun) in bad odor. Congress itself has imposed rulemaking requirements upon some agencies that come close to specifying a closed "record" of the sort once reserved for adjudication. And it has specifically required ex parte contacts with high-level officials of the Federal Trade Commission to be made public. Pub. L. No. 96-252, 94 Stat. 379-80 (May 28, 1980), 15 U.S.C. 57a(j)(2).

The result of such limitations is that even when the applicable standard of judicial review leaves room for political judgment, the agency does not have the ability to make that judgment intelligently. It is perhaps no coincidence that the agency whose rulemaking in recent years has been most politically inept, has aroused most opposition in Congress, has been most "unresponsive" to the popular will (as that will is expressed through our political institutions) is the Federal Trade Commission. Congressional overruling of FTC rules has occurred under the tenure of regulation-oriented Chairman Michael Pertschuk and deregulation-oriented Chairman James Miller alike. The FTC happens to be the agency in which the judicialization of the rulemaking process (including elimination of high-level ex parte contacts) has been most pronounced.

* * *

Lest I be misunderstood, I am not suggesting that all rulemaking is appropriate for political judgment. There are, surely, instances in which Congress has given an agency a technocratic mandate that should be executed technocratically. For example, there is no room for political accommodation or the application of unanalytic value judgment in the Food and Drug Administration's implementation of the Delaney Amendment, which requires the banning of food additives that have been shown to cause cancer in animals. But when the Federal Trade Commission is told to prohibit "unfair or deceptive trade practices," or the Federal Communications Commission to manage the airwaves "in the public interest, convenience and necessity"—that is another matter. What such broad delegation precisely seeks is the conferral of nontechnocratic, political judgments upon the agencies. That may be good or bad; it may even, in the view of some, be unconstitutional. But if it is to *work*, if the modern complaint of the "unresponsive" bureaucracy is not to become a permanent feature of our system, the scheme of judicial review and the requirements of administrative process must permit political judgments to be made politically.

The real problem, of course, is to sort out those agencies that are supposed to be political (in the sense I have discussed) and those that

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are not—or more precisely those functions of each agency that are supposed to be political and those that are not. We have made little progress in that regard. Indeed, as the above comments suggest, the whole trend in recent years has been simply (and somewhat moralistically) to deny the political component of agency action. There may be some signs of change. The Administrative Conference, for example, recently adopted a recommendation entitled “Procedures for Negotiating Proposed Regulations,” which envisions pre-rulemaking “regulatory negotiation” between the agency and interested parties concerning the text of a proposed rule. ACUS Recommendation 82-4, 47 Fed. Reg. 30,708 (July 15, 1982). It is a giant step backward in time and forward in intelligence.

More needs to be done to bring the political, accommodationist, value-judgment aspect of rulemaking out of the closet. When NHTSA comes to reconsider the passive-restraint rule recently remanded by the D.C. Circuit, and if it chooses to adhere to its prior course, it would be refreshing and instructive if, instead of (or at least in addition to) blowing smoke in our eyes with exhaustive technical and economic data, it said flat-out: “It is our judgment that people should not be strapped in cars if they don’t want to be; nor should they have to spend substantial sums for air-bags if they choose otherwise.” A political judgment, the retribution or reward for which will be meted out by Congress, or at the polls, but not in the courts.

