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A In Defense of the Hard Look: Judicial Activism and Administrative Law

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IN DEFENSE OF THE HARD LOOK: JUDICIAL ACTIVISM AND ADMINISTRATIVE LAW

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I.

We have all come to understand the common law as a regulatory system.[1] The common law courts used the law of tort, contract, and property to regulate the economy. The resulting doctrines set forth the terms under which contracts would be enforced; the circumstances under which one person would be liable for injury done to another; and the methods for conveying or interfering with rights in property.

This system — the common law system of the eighteenth and nineteenth centuries — was a period of genuine judicial activism. Substantial authority for operating the economy was vested in the courts, largely under prevailing theories of laissez-faire individualism.

This system was of course known to, and accepted by, the Framers of the Constitution. The management of the economy by relatively decentralized courts proved to be an effective safeguard against capture by factional interests seeking to redistribute wealth or opportunities in their favor.[2]

All of this has of course changed dramatically in the last century or so. For a variety of reasons, the common law system has been displaced by a vast administrative apparatus. Nowadays, the decisions formerly made by the common law courts have been delegated to state and above all federal bureaucracies. The common law of torts has been replaced by federal law governing such matters as pollution and discrimination. New sorts of rights have been created, and the responsibility for their protection has been delegated to federal agencies. Administrative law — and I speak now

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1 *See* R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977).

2 *See* Stewart & Sunstein, *Public Programs and Private Rights,* 95 HARV. L. REV. 1193, 1278-79 (1982). More subtle forms of "capture" are discussed in various pieces in THE POLITICS OF LAW (D. Kairys ed. 1982). *See also* H. COLLINS, MARXISM AND LAW 61-74 (1982).

of substantive administrative law — has for the most part displaced the common law system.

In these circumstances, it should perhaps be unsurprising that the courts have sometimes stepped back in — that they have in a sense reasserted powers that were theirs when the republic was founded. That reassertion of power has manifested itself in various efforts to police and discipline the administrative process. Let me attempt to list, by way of introduction, some of the ways in which the courts have carried out that function.

1. *The requirement of reasoned explanation.* Agencies must give detailed explanations for their decisions. Conclusory statements are insufficient, and departures from past practices must be persuasively justified.

2. *The requirement of adequate consideration.* Agencies must demonstrate that they have given adequate consideration to all arguments raised by the parties. Alternatives must be investigated.

3. *The requirement of consistency.* Like cases must be treated alike; inconsistent treatment may result in reversal or remand for explanation.

4. *The prohibition on arbitrariness.* Decisions that appear "arbitrary" are reversed. This principle may, but usually does not, include a rather strict judicial look at the merits.

Judicial activism in the field of administrative law has usually consisted of one or more of these devices which, in concert, make up the so-called "hard look" doctrine. Thus, the controversial decision of the D.C. Circuit in the *Vermont Yankee*[3] case amounted to an insistence on procedural safeguards designed to ensure that, before licensing nuclear power plants, the Nuclear Regulatory Commission had considered the possible dangers of spent nuclear fuels. Similarly, the decision of the same court in the airbags case[4] was based on a fear that the Reagan Administration had decided against airbags on the basis of an unsupported conclusion that detachable belts would not be used.

Requirements of this sort are, in the end, quite modest, at least when compared with the enormous regulatory authority exercised by the common law courts. To say this is not to deny the possibili-

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3 National Resources Defense Council, Inc. v. NRC, 547 F.2d 633 (D.C. Cir. 1976), *rev'd*, Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978).

4 State Farm Mut. Auto. Ins. v. Department of Transp., 680 F.2d 206 (D.C. Cir. 1982), *vacated*, Motor Vehicle Manufacturers Assn. v. State Farm Mutual Ins., 103 S. Ct. 2856 (1983).

ty of abuse or usurpation. But I want to suggest here that the aggressive posture of courts reviewing administrative action ought not to be understood as a usurpation of legislative or executive prerogatives, but as a way for the courts to reclaim some of their prior decision making authority, and at the same time to promote, rather than impair, the original purposes of the separation of powers. I believe that, far from finding such review to be an intrusion on its own prerogatives, Congress endorses it; that considerations of separation of powers argue in favor of rather than against it; and that the concern about judicial usurpation of executive authority, albeit legitimate, is insufficient to justify rejecting the current form of hard look.

The hard look doctrine can of course serve a great variety of substantive purposes. Most crudely, it can be a device for the achievement of straightforwardly "political" ends — either to prevent regulation, or to promote it. The hard look doctrine is sometimes a means of ensuring that agencies do in fact impose statutorily required regulatory controls on private industry, but such cases are comparatively rare. More frequently, hard look review is used as a method of testing regulatory initiatives — by requiring agencies to show that the benefits of regulation justify its costs, or that a significant problem is involved. In this form, hard look review is a means of promoting private ordering.

When used to test agency inaction, or agency failure to regulate sufficiently, such review operates as a means of determining whether agencies have disregarded the values chartered in regulatory statutes. It is no coincidence that review of this sort grew up shortly after widespread attention had been given to instances of apparent "capture" of agencies by regulated industries. Responding to this perception, courts began to police regulatory agencies to ensure that statutory enactments had not been perverted or undone in the implementation process.

Judicial activism in administrative law thus appears in two different contexts. Some courts, notably the United States Court of Appeals for the Fifth Circuit, have used the hard look approach to ensure that regulatory controls are well-founded in the facts and in statutory policy. Thus applied, the hard look doctrine serves as a means of promoting private ordering — and should in this sense be congenial, institutional matters aside, to those disposed to a decentralized society. In this respect, the hard look doctrine fits well with the traditional function of the reviewing courts, which was the protection of private autonomy. Other courts, on occasion the

United States Court of Appeals for the District of Columbia Circuit, have used the hard look approach to protect the beneficiaries of regulatory statutes. In such cases, that approach operates as a check on an agency's failure to carry out the commands of Congress. Of course it might be thought that any such failure is itself a part of the congressional plan, but I am quite doubtful that in the general run of cases, there is sufficient legislative supervision of the regulatory process to justify a conclusion that failure to enforce is intended.

In the latter category of cases, judicial activism might be applauded for the same reason that the libertarian catalogue of private rights has proved inadequate in all heavily industrialized nations. For courts to protect private ordering — freedom to go about one's business without unauthorized regulatory intrusion — is all very well, but it must be accompanied by a willingness to protect citizens from public law torts such as racial discrimination, pollution, and the wide range of harms recognized in an affirmative state. That protection usually takes the form of safeguarding not traditional private rights, but a process of decision designed to ensure that the relevant public values will be properly identified and implemented.[5]

II.

Thus far I have spoken in quite general terms about the purposes served by judicial activism in administrative law. It remains to discuss the problem of legitimacy. Where do the courts get the authority to perform this policing function? Three factors seem relevant: (1) the intent of Congress; (2) the constitutional background; and (3) the nature of the link between the political process and agency decisions.

A. The Intent of Congress

One pertinent consideration — though not, in my view, the only one — is the intent of Congress. In constitutional adjudication, Congress' view as to the proper level of judicial scrutiny is normally entitled to little weight. In administrative law, by contrast, it is Congress that is, at least in the first instance, entrusted with decid-

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5 *See generally* Sunstein, *Deregulation and the Hard Look Doctrine*, 1983 SUPREME COURT REVIEW 177; *cf.* J. VINING, LEGAL IDENTITY (1978).

ing whether and to what extent judicial "activism" is desirable. The basic charter in which congressional will is expressed is the Administrative Procedure Act.

The outlines of that charter, insofar as they are relevant here, should be familiar. In adjudication, an agency's decision must be upheld if supported by substantial evidence. In the *Universal Camera* case,[6] the Supreme Court explained that the substantial evidence test was an expression of a "mood." That mood consisted of direction "that courts must now assume more responsibility for the reasonableness and fairness" of agency decisions.[7] Such a direction was of major importance, for when the APA was enacted, the vast majority of agency decisions were subject to the substantial evidence test. That test is applicable to adjudication and on-the-record rulemaking, two major categories of administrative action.

For so-called informal rulemaking, the APA is more ambiguous. The basic statute furnishes a test of "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" as the basic approach for notice and comment rulemaking. There is considerable controversy over whether the APA drafters intended this test to apply to judicial review of rulemaking in enforcement proceedings. There is reason to believe that in such cases, a trial *de novo* was intended in district court.[8] The Supreme Court, however, has firmly rejected this interpretation.[9]

The APA is a product of increasing dissatisfaction with agency decision making. That dissatisfaction stemmed in turn from concern that agencies had escaped the original constitutional safeguards of separation of powers and electoral accountability. At least one of the attempted remedies was the provision of a meaningful judicial check — a check that would at once guard against statutory violations and work against arbitrariness. This was the "mood" of which Justice Frankfurter spoke in *Universal Camera.*

It would, I think, be necessary to ignore the history of the APA in order to conclude that courts should adopt the sort of deferential posture sometimes urged for review of agency decisions. Cer-

6 Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

7 *Id.* at 490.

8 *See* Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

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

tainly the drafters of the statute were not adverse to the idea of a vigorous judicial rule.

There is recent evidence to suggest that the current Congress agrees. We are all familiar with the Bumpers amendment, a proposed revision of the APA that would increase judicial scrutiny of agency determinations. The Bumpers amendment has had a number of different incarnations, but all of them would to a greater or lesser degree codify and strengthen the hard look doctrine championed by the late Judge Leventhal. There is considerable support for the amendment in Congress. One of the reasons for its failure to pass is the argument, repeatedly made against the amendment, that the courts are already doing what the amendment would require. That development, I think, tells us quite a bit about Congress' attitude toward judicial review of agency action.

B. The Constitutional Background

I have already referred to the important role of the common law courts in the original scheme of separated powers. It is important to understand the extent to which those courts were entrusted with responsibility for operating the economy. The courts, moreover, had a number of virtues for accomplishing that task. They were relatively decentralized; they were more or less immune from capture, at least in its crudest forms;[10] and the adjudicative process itself imposes constraints on the decision maker's power to distribute wealth or power in any particular direction.[11]

The administrative agency arose, of course, in response to a number of factors that made the resource allocation role of the common law courts much less attractive. Prominent among these were perceptions that the common law catalogue of private rights was inadequate; that the remedial tools available to a court were too rigid; that politically accountable entities would be better able than courts to identify and implement the relevant public values; and that a self-starting, specialized institution would be best able to uncover and remedy legal wrongs. But this displacement of judicial — as well as legislative and presidential — authority has had serious consequences for the separation of powers. In particular, it has raised a serious danger of the capture of governmental power by faction.

10 *See* Stewart & Sunstein, *supra* note 2.

11 *See* Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982).

The intended function of judicial activism in administrative law is to produce a kind of second-best surrogate for the safeguards created by the pre-New Deal scheme of separated powers. The notion is that by requiring consideration of statutorily relevant factors, and by barring reliance on irrelevant factors, persistent biases in the administrative process may be redressed. In this respect, recent judicial efforts in administrative law operate as a "representation-reinforcing" device analogous to means-ends scrutiny in constitutional law. Those efforts attempt to replicate the original constitutional safeguards by guarding against the capture of governmental power by faction.[12]

This is not to deny that judicial review of agency action may be dysfunctional or that in many contexts it has a potential for abuse. But it is to suggest that a relatively active judicial posture tends more to implement than to override the original goals of the separation of powers.

C. The Political Process and Agency Decisions

These considerations would lose much of their force if it were possible to show a close connection between agency decisions and congressional will. If there were such a connection, it would be unnecessary to rely on the courts for a policing function; legislative control would in some respects be a preferable surrogate.

Much work remains to be done on this difficult question. But I doubt that anyone even vaguely familiar with the administrative process believes that a close connection can be shown. It is fanciful to suggest that the day-to-day decisions of the administrative agency are subject to close electoral control. What evidence we have suggests that the link between the political process and particular agency decisions is too thin to justify judicial abdication.[13]

III.

Thus far, I have suggested some of the purposes served by the always vague notion of "activism," as that term may be understood in administrative law. I have also tried to assemble several considerations that tend to suggest that a reasonably firm judicial hand may be a legitimate part of the constitutional scheme.

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12 *See generally* Stewart & Sunstein, *supra* note 2. On the dysfunctional character of judicial review, *see* J. MASHAW, BUREAUCRATIC JUSTICE (1983); Breyer, Vermont Yankee *and the Courts' Role in the Nuclear Power Controversy*, 91 HARV. L. REV. 1805 (1979).

13 *See* R. LITAN & W. NORDHAUS, REFORMING FEDERAL REGULATION (1983).

We are left with a familiar problem: Who will guard the guardians? There is, to be sure, reason to be fearful of the sort of "mood" that I have suggested that the APA, and constitutional considerations, dictate for judicial review. An active judicial posture may be inconsistent with the rationale that underlay the original creation of administrative agencies, substituting a politically unaccountable, decentralized, and generalist decision maker for the relatively specialized, centralized, and accountable administrator. There is, moreover, a danger that an active judicial stance may result in usurpation of political prerogatives. Why are we to suppose that things will get better if the courts take hold of the administrative process? After all, it was in large part dissatisfaction with forensic mechanisms of resource allocation that led to the administrative state in the first instance.

To a substantial degree this argument has force. It would be a mistake to suggest that administrative "failure" can be wholly remedied by judicial action. Indeed, Congress and the executive should be encouraged to exercise more control over the administrative process, for they have more and in many respects better techniques for exercising a supervisory role. But I would not exclude a relatively vigorous judicial role. The very vices of the courts as resource allocators turn out to be virtues in the context of review of agency action (or inaction). Independence and decentralization are, in the latter context, a means of promoting original constitutional goals. No one would seriously suggest that the courts ought to engage in *de novo* review of agency action and to that extent to reassert their pre-twentieth century role. But judicial activism, as manifested in the hard look doctrine, is very different.

IV. Conclusion

I have suggested that the hard look doctrine is a legitimate and salutary development. A relatively vigorous judicial posture was contemplated by the Administrative Procedure Act, and there is reason to suspect that it is favored by the political branches of government. The reason should be clear. Administrative agencies were a severe intrusion on the original constitutional structure. This is so not merely in the obvious sense that they displaced lawmaking authority originally vested in Congress, and that they exercised executive powers without close control on the part of the chief executive. It is so in the less obvious, but equally important,

sense that they usurped resource allocation and other authority that was the original province of the state and federal courts.

That displacement created significant dangers. Most importantly, it raised the spectre that parochial private interests — factions — would be permitted to use governmental power to redistribute wealth or power in their favor. Judicial activism in administrative law is best understood as a response to this prospect. The effort is no longer primarily to protect private rights, but to promote identification and implementation of the values at stake in regulation. As such, it should not be understood as a usurpation of congressional prerogatives, but as a means for courts to reclaim a part of their original constitutional authority and in the process to promote some of the original goals of the separation of powers scheme.