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Regulatory Analysis and Judicial Review*

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The role assigned to me in this discussion is to assess the impact of regulatory analysis upon judicial review of informal rulemaking. The regulatory analysis procedures that have been either (1) actually employed by the White House pursuant to executive orders or (2) sought to be embodied in statutes by recent legislative proposals are a reflection of growing concern on the part of both Congress and the President with the fact that more lawmaking is being done off Capitol Hill than on it. Neither appears content to leave control of such lawmaking solely with the courts; each has evinced a desire to have enhanced capability to affect the rulemaking results.

In organizing my thoughts for this symposium, I was surprised to find that over four years have elapsed since I first addressed this matter in a lecture at the Columbia Law School.¹ At that time I noted that the principal congressional response to the problem was a widening affinity for the legislative veto of agency rules and regulations. The movement towards greater presidential control of this activity was then hardly more than a gleam in Lloyd Cutler's eye, shining forth from the article he and David Johnson authored for the *Yale Law Journal* in 1975.²

Each of these approaches appeared to assume that reliance upon judicial review was insufficient to assure the protections against rampant rulemaking that both Congress and the President believed to be needed. Only Senator Dale Bumpers, who had first introduced his well-known amendment of the Administrative Procedure Act in 1975,³ seemed to think that the road to reform lay through expanding and strengthening the reviewing powers of the courts. I must say that not much has happened in the intervening years, notwithstanding the intensive consideration by the Congress just ended of a spate of regulatory reform bills, to affect significantly the nature and scope of judicial review.

The one visible impact I see on the work of my own court has been caused by the deregulation achievements of the Carter Administration. No longer are we afflicted with those absurd air line route cases, in which several

* The text is that of a talk given on January 4, 1981, in a symposium sponsored by the Section of Administrative Law of the Association of American Law Schools at the Annual Meeting of the latter in San Antonio, Texas. A few notations have been added to provide necessary references and to report relevant events intervening between that time and publication, including those triggered by the advent of a new administration in Washington two weeks later.

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1. McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1976).

2. Cutler and Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975).

3. S. 2408, 94th Cong., 1st Sess. (1975), *reintroduced*, S. 86, 95th Cong., 1st Sess. (1977). See note 8 *infra*.

carriers, each equally capable of providing the service, struggled to persuade us that the Civil Aeronautics Board had erred in making the certificate award it did—a result, incidentally, that, without injury to the public interest, it could as easily and as sensibly have reached by merely flipping a coin. Disappearing fast now are the plethora of motor carrier certification cases in which the existing truck lines struggle to fend off any new competition. Soon will be gone many of the railroad appeals from Interstate Commerce Commission rate orders. And there is reason to hope that Congress will shortly move to reexamine the regulatory powers of agencies like the Federal Communications and Federal Maritime Commissions.

This is where the effective action has been recently in regulatory reform, and it has eliminated much rulemaking as well as adjudication from the reviewing court calendars. Where deregulation has not occurred, however, there has been little, if any, change in the nature or extent of judicial review.

The legislative veto, in its various forms of one-house or two-house action, or by congressional committee, has been increasingly resorted to by Congress. To the extent the veto is exercised, there is nothing for the courts to do except, of course, to decide whether the legislative veto itself comports with the Constitution. The final resolution of that issue has been delayed, principally because the courts have declined invitations by the executive branch to invalidate the veto in the abstract, that is to say, in the case where no one is complaining about an actual exercise of the veto.⁴

When I explored this subject four years ago at Columbia, there was no definitive and finally authoritative case law on this subject. I was told then that the Government had a case pending in the Ninth Circuit, involving the veto by the House of Representatives of a deportation order, in which resolution of the constitutional issue could not be escaped. Last week—and this says a lot about the problems of the courts of appeals generally as well as of the Ninth Circuit in particular—the case, *Chadha v. Immigration and Naturalization Service*,⁵ was decided.

The veto exercised in that instance was held invalid as violative of “the

4. See, e.g., *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (en banc), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

5. 634 F.2d 408 (9th Cir. 1980). An appeal was filed by the Government in the Supreme Court on May 1, 1981 (No. 80-1832). Since the Government and Chadha are in agreement that the legislative veto brought to bear in that case is invalid, the Senate and the House of Representatives have separately intervened in the appeal, and are urging its dismissal on the grounds that the Government, as the prevailing party, lacks standing to invoke the Supreme Court's appellate jurisdiction under 28 U.S.C. § 1252 (1976) and that the parties lack the adversity required by article III for a justiciable case or controversy.

The House and Senate have also filed separate petitions for certiorari: *United States House of Representatives v. Immigration and Naturalization Serv.*, 50 U.S.L.W. 3001 (U.S. June 22, 1981) (No. 80-2170); *United States Senate v. Immigration and Naturalization Serv.*, 50 U.S.L.W. 3001 (U.S. June 22, 1981) (No. 80-2171). The petitions raise a number of issues other than the constitutionality of the one-house veto, including the contention that the Ninth Circuit need not have reached that issue because Chadha had married an American citizen after the challenged deportation order and was thus eligible for permanent residence. *Petition for Cert. in No. 80-2171* at 12-13. See also *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408, 417 n.6 (9th Cir. 1980).

The houses of Congress also assert that the Ninth Circuit decided the legislative veto issue without the benefit of a justiciable controversy because neither Chadha nor the Government defended the constitutionality

constitutional doctrine of the separation of powers because it is a prohibited legislative intrusion upon the Executive and Judicial branches." In a Christmas Eve statement, President Carter hailed the present handed him by the Ninth Circuit as having "perhaps the most profound significance constitutionally" of any case handed down during his term of office, since it assertedly ended a forty year battle between the executive branch and Congress over the reach of their respective powers.

Of course, prolonged disagreements of this constitutional magnitude do not normally end in a single court of appeals or in a single case, but this decision may conceivably be the vehicle of a Supreme Court ruling. If that ruling is a sweeping affirmance, then perhaps control of rulemaking by veto will no longer be available to Congress.⁶ One alternative still available to it, obviously, is to keep the lawmaking power in its own hands and not to delegate it to either independent or executive branch agencies as broadly as it has been in the habit of doing. Perhaps a more likely congressional response—despite Justice Rehnquist's recent warning about broad delegation in the OSHA benzene case⁷—is to continue its wide-ranging delegations and to strengthen judicial review of the resulting agency rules.

A development of the last-mentioned character could presumably breathe some life into the apparently dormant Bumpers Amendment, although any really good idea in this limited field ought not to require six years for its time to come. Certainly at the time of its first unveiling in 1975, it did not seem like a good idea at all to some of the academic pundits of administrative law, as well as to many private lawyers practicing in the field. It got its first lift when the House of Delegates of the American Bar Association, stampeded by a jury speech about the iniquities of the federal bureaucracy, surprised and confounded its Section of Administrative Law by rejecting the latter's strong recommendation against endorsement. Emboldened by this unexpected support, Senator Bumpers shortly thereafter moved successfully on the Senate Floor to add his amendment to the Justice Department's bill for improvements in the federal judiciary. Managing that bill as Chairman of the Judiciary Committee, Senator Kennedy ardently opposed the amendment, but again the popular tide was running against the rulemakers, and, to the great distaste of its sponsors, the bill as amended was passed by the Senate.

Since then a tedious and prolonged bout of trading words for inclusion in

of the veto before that tribunal. If the Supreme Court grants certiorari in either case, and accepts one or both of these arguments, it will have the option of vacating the Ninth Circuit decision and remanding Chadha's case to the Immigration and Naturalization Service without the necessity of reaching the legislative veto question.

6. *Chadha* involved a veto by the House of Representatives of a decision by the Immigration and Naturalization Board of Appeals to suspend a deportation order on a showing of special hardship by the deportee. Thus, the veto in this instance had some flavor, which did not go unnoticed by the court of appeals, of legislative interference with a quasi-judicial act by an agency within the executive branch. The legislative veto may conceivably be on stronger ground when exercised with respect to laws in the form of regulations emerging from informal rulemaking pursuant to lawmaking power expressly delegated by Congress.

7. *Industrial Union Dep't., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 671-88 (1980) (Rehnquist, J., concurring).

and exclusion from the amendment has gone on in connection with the regulatory reform bills considered at the last session. But agreement among those necessary to its enactment by Congress was not reached, and the session ended with the Bumpers Amendment still in the legislative limbo.⁸

8. The Bumpers Amendment is now before the first session of the 97th Congress as part of S. 1080, the Regulatory Reform Act introduced by Senator Laxalt and 75 of his colleagues, and reads as follows:

§ 706. Scope of review

(a) To the extent necessary to decision and when presented, the reviewing court shall independently decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

. . . .

(c) In making determinations under clause (2)(C) of subsection (a) of this section [that agency action is in excess of statutory jurisdiction, authority, or limitations], the court shall require that action by the agency is within the scope of the agency jurisdiction or authority on the basis of the language of the statute or, in the event of ambiguity, other evidence of legislative intent. In making determinations on other questions of law, the court shall not accord any presumption in favor of or against agency action.

Testifying on May 14, 1981, before the Subcommittee on Regulatory Reform of the Senate Judiciary Committee, one administration spokesman—James C. Miller, III, Executive Director of the Presidential Task Force on Regulatory Relief—had this to say about the Bumpers Amendment provision in S. 1080:

In connection with judicial review, we should add one point about the Bumpers Amendment. We believe that the bill's provisions eliminating any presumption of validity with respect to an agency's assertion of power or jurisdiction beyond its statutory authorization raise no serious problem. Indeed, under the Executive Order we are committed to achieving this same objective. But other presumptions not involving agency jurisdiction or power—such as those relating to procedural regularity, statutory interpretation of technical or scientific provisions, and an agency's own rules—serve a useful purpose in focusing judicial review on the issues of significance. Moreover, elimination of those presumptions could create needless uncertainties and litigation.

Deputy Attorney General Schmults, testifying on May 14, 1981, before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee on H.R. 746, a regulatory reform bill containing a Bumpers-type provision, characterized the proposal as "troubling," and went on to say:

The first sentence of proposed section 706(c) would remove existing presumptions favoring the validity of agency actions with regard to "questions of law." This is a very broad category. "Questions of law" would include questions of constitutionality, procedural interpretation, and procedural regularity, as well as statutory law. Courts have long presumed the constitutionality of agency action for the same reason that they presume the constitutionality of legislation—to avoid unnecessary intrusions into the decisions of a coordinate branch of government. With regard to procedures, the Supreme Court has recently emphasized the need for courts to recognize the agencies' discretion to choose the procedures best suited to performing their assigned tasks, consistent, of course, with procedures prescribed by statute. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). And an agency, as draftsman, surely should be accorded some deference as to the meaning of its own regulations.

Turning to statutory authority and statutory interpretation, the agency that works with a statute undoubtedly has valuable insight into how that statute's terms are most sensibly and efficiently to be interpreted. The deference that properly flows from that circumstance, however, is not allowed to overcome the plain wording of a statute, or the result pointed to by legislative history. The proposed amendment would require that decisions on statutory authority be based entirely on the language of the statute or other ascertainable legislative intent. All we would urge is that the Congress intends that its laws be efficiently carried out; and that, where an agency interprets its organic statute in a way it believes most faithful to Congressional intent, that judgment is valuable for a court to consider. Such an agency ruling is entitled to deference

. . . [J]udicial deference to Executive interpretations, within reason and ascertainable legislative intent, is a critical part of the Executive's practical discretion on a day-to-day level. Since statutes do not generally resolve all the myriad problems of administrative interpretation, the Executive must have some power to act interstitially.

In conclusion, I would like to sound a general warning about efforts to cure administrative deficiencies: it will be a rare case where such remedy is found in increasing the role of the reviewing courts. With the abandonment of deference to the administrative agency, the opportunity for creative interpretation of laws and regulations, and independent weighing of facts, looms great for the judiciary. It is almost a truism that what your bill takes from administrative agencies, it gives to courts.

Another version of the Bumpers Amendment, drafted perhaps as a partial response to the comments of the Deputy Attorney General, would direct a reviewing court to forbear reliance upon the agency's own legal

In his last statement at the session in support of his revised amendment, Senator Bumpers quoted with satisfaction from one of my court's recent cases in which we, after considering the language of the statute and its underlying legislative history, held that to uphold the grant of statutory authority claimed by the agency would be "an unwarranted judicial intrusion upon the legislative sphere wholly at odds with the democratic processes of lawmaking contemplated by the Constitution."⁹

Since I wrote those words, I can only assume that Senator Bumpers can have no quarrel with the way I go about interpreting agency statutes. And I see nothing in the amendment, even as revised, that would stop me from going about the interpretative job in the way I like to think I always have.¹⁰ When I have, accordingly, questioned the need for the amendment, I have been told by its proponents that, however innocuous the language of the amendment may turn out to be, the very fact of its enactment will send what is variously termed a "signal" or "message" to the federal judges to shape up and stop rubber stamping the agencies' rulemaking.

Congress has presumably more important work to do than merely to transmit "signals" or "messages" about judicial attitudes. If it persists in this, however, Congress should make sure that its signal is strong enough to reach—and to be obeyed by—the Supreme Court. Recently the Court unanimously reversed the Fourth Circuit in a case¹¹ taken for review because of a conflict between it and a case of mine called *Weyerhaeuser v. EPA*,¹² in which we upheld the agency's construction of its statutory authority. In justifying its holding that "the Administrator has adopted a reasonable construction of the statutory mandate" and that "the [Fourth Circuit] Court of Appeals erred in not accepting EPA's interpretation of the Act," the Supreme Court concluded its opinion by saying that "[i]t is by now a commonplace that 'when faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers charged with its administration,'"¹³ citing, and quoting from, only *Udall v. Tallman*.¹⁴

judgment only in matters of "statutory jurisdiction or authority." Since the agency's determinations on all other questions would continue to enjoy a traditional measure of deference, the enactment of this language could present the courts with the nice question of when an agency's application of a vague statute to particular facts is a determination of its jurisdiction. It could be argued, for example, that the NLRB's decision that certain newsboys were "employees" and thus entitled to participate in collective bargaining under the Wagner Act, *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), was jurisdictional in nature.

9. *Lubrizol Corp. v. Environmental Protection Agency*, 562 F.2d 806, 820 (D.C. Cir. 1977).

10. The District of Columbia Circuit has recently held that an agency's assertion of jurisdiction is subject to especially close scrutiny. *Office of Consumers' Counsel v. Federal Energy Regulatory Comm'n*, 655 F.2d 1132 (D.C. Cir. 1980). In concluding that FERC lacked jurisdiction under the Natural Gas Act to regulate synthetic gas facilities, the court distinguished that "legal issue" from other questions, such as determinations of just and reasonable rates, that implicate the Commission's "expertise or specialized judgment." *Id.* at 1141. In the former instance, Judge Wald said, "[T]his court has the preeminent responsibility to independently scrutinize and decide all jurisdictional issues." *Id.* at 1142.

11. *Environmental Protection Agency v. National Crushed Stone Assoc.*, 449 U.S. 611 (1980).

12. 590 F.2d 1001 (D.C. Cir. 1978).

13. 449 U.S. 64, 83 (1980).

14. 380 U.S. 1, 16 (1965).

When *Udall* was decided 16 years ago, it made a peculiarly strong impression on me because it was the first case I sat on which was reversed by the Supreme Court. "Deference" to an agency's construction of its statute is perhaps not the happiest way to formulate a reviewing court's proper approach to that construction, but I learned the hard way early on that, as an inferior court judge, if you are going to knock over the agency's reading, you had better be sure you are right.

The focus of our interest this morning is upon the third of the rulemaking control mechanisms briefly canvassed in my 1977 inquiry: presidential control of delegated lawmaking. At that time, such control was in an incipient stage of development. President Nixon had moved in this direction as early as 1971 with an executive order creating the so-called "quality of life" review of proposed health and safety regulations prior to publication for comment. That review was spearheaded by the Office of Management and Budget, which collected the views of other affected agencies, with the President, if necessary, finally calling the shots as to whether they should go forward. But that program was of limited reach and, so far as I am aware, entailed no consequences with respect to the scope of judicial review.

President Ford in 1974 acted by executive order to require the executive branch agencies to prepare economic impact statements showing the cost increases attendant upon the proposed rules and the possibility of cheaper alternatives. This order was eventually succeeded by President Carter's Executive Order No. 12,044 in 1978, under which each agency in the executive branch issuing rules or regulations was directed to file an initial regulatory analysis at the time a rule was noticed for comment and a final regulatory analysis at the time of promulgation. That order explicitly envisaged no role for judicial review of these analyses or of the procedures by which they came into being. The analyses were to be available for a reviewing court's information as part of the rulemaking record.¹⁵

15. President Carter's executive order was itself succeeded by Executive Order 12,291, 64 Fed. Reg. 13,193 (1981), issued by President Reagan on February 17. In many respects the scheme outlined by President Reagan's order is similar to that adopted by the Carter Administration. Still limited in scope to executive branch agencies, the new executive order maintains the notion of a preliminary and final regulatory analysis when rules are published in proposed and final form respectively. The new administration requires that an agency considering a "major" rule, defined as one whose impact on the economy is likely to exceed \$100 million, which will likely raise costs or prices, which will significantly impede business, or which is so denominated by the Director of the Office of Management and Budget, *id.* §§ 1(b), 6(a)(1), must include in its notice of proposed rulemaking and publication of the final rule a description of the costs, benefits, and net of benefit over cost of the rule, together with an analysis of alternative approaches that "could substantially achieve the same regulatory goal at lower cost," and why such alternatives were rejected. *Id.* § 3(d). The Carter approach had required analysis of the economic consequences of the rule and its alternatives, but had not required explicit cost/benefit analysis. Executive Order 12,044, § 3(b), 43 Fed. Reg. 12,661 (1978).

Another difference of significance between the new and old regulatory oversight plans lies in the larger role assigned by the Reagan Administration to the Office of Management and Budget. The Carter order had not given OMB any authority to review particular regulatory analyses, although it did have authority to approve agency plans for implementation of the executive order. *Id.* § 5. In contrast, the Reagan executive order vests in OMB the power to review preliminary and final regulatory analyses and to require an agency response to any comments offered by OMB. Executive Order 12,291, § 3(f). As part of those comments, OMB may require the agency "to obtain and evaluate . . . any additional relevant data from any appropriate source." *Id.* § 6(a)(3).

Both executive orders stated that their regulatory analysis provisions were not intended to provide new

Public support for the concept of greater control by the executive of rulemaking was greatly enhanced by the report of the ABA's Commission on Law and the Economy, which was approved by the House of Delegates on the same day the Bumpers Amendment got through that body. That report, influenced strongly by the Cutler thesis, contemplated, in respect of Presidential action either before or after the agency rulemaking process had taken place, an elaborate statute under which all three branches of the government would have a role, although it left ambiguities as to the effect on judicial review of the participation of the Congress and the President.

A separate proposal by the Commission involved no statute but rather the voluntary institution by the President of regulatory analysis procedures substantially like those being pursued under President Carter's Executive Order No. 12,044. That proposal contemplated the usual judicial review of the final rule's compliance with the substantive and procedural requirements of the agency's governing statute, but such review was explicitly not to extend to the adequacy of the regulatory analysis or other observance, or alleged nonobservance, of the standards and procedures ordered by the President to be followed for intra-executive branch illumination of the rulemaking process.

The significance of what the ABA Commission's report provided with respect to judicial review was minimized by the quick shift in attention from that report to the legislative proposals made to the last Congress to implement its objectives. The 96th Congress saw a variety of bills relating to rulemaking. The one that emerged as the most likely candidate for enactment was S. 262, which was considered by both the Senate Committee on Governmental Affairs and the Judiciary Committee. Its regulatory analysis provisions followed closely the pattern of Executive Order 12,044 in requiring, in respect of "major" rules, both an initial regulatory analysis on the institution of notice and comment, and a final regulatory analysis upon promulgation. The bill expressly precluded judicial review, both with respect to (1) agency determinations with respect to the applicability of the statute, including whether a rule is "major" or not within the statutory definition of that term, and (2) the regulatory analyses themselves and the compliance *vel non* of the agency with the procedures prescribed for preparing and filing such analyses.

It provided, however, that the regulatory analyses are to be part of the record in any action for judicial review of a promulgated rule, and that "the contents of a regulatory analysis shall, to the extent relevant, be considered by a court when determining the validity" of the rule. In empowering the agency, in its consideration of a major rule, to employ hearing procedures beyond those otherwise required by law, the bill was at pains to state that the agency's decision to invoke, or not to invoke, this authority, and the choice of

grounds for judicial review. Executive Order 12,044, § 7; Executive Order 12,291, § 9 (it is "not intended to create any right or benefit . . . enforceable at law . . . against the United States, . . . or any person"). The Reagan scheme also provides that the regulatory analyses are to be placed in the rulemaking record, for judicial, as well as public, inspection. *Id.*

one or more of the procedures so authorized, "shall be within the sole and unreviewable discretion of the agency."

It seems fairly clear that the current mood of the Congress is to keep the courts out of controversies over the way an agency has gone about performing its regulatory analysis responsibilities. Certainly, it is plain from the committee reports that litigation over such questions is not to delay judicial disposition of challenges to the merits of the rules as promulgated. That this may be the purpose of the Congress as a whole is evident from one regulatory reform statute that did emerge from the 96th Congress in its closing days, namely, the Regulatory Flexibility Act, approved September 19, 1980, effective January 1, 1981.

This law provides for what it calls initial and final regulatory flexibility analyses, the purpose of which is to tailor regulations to the special circumstances of small businesses, small organizations, and small governmental jurisdictions, as those are defined in the law. Judicial review is expressly precluded in a manner virtually identical with that used in S. 262.

It would appear from the foregoing that the future statutory deployment of regulatory analysis as a regulatory reform measure will not in all likelihood enlarge the present reviewing responsibilities of the courts. What may be of interest to think about is the extent to which the presence in the record before the court of the initial and final regulatory analyses may affect the court's judgment as to the rule's validity. These analyses would be simply additional matters for the court to consider in performing its function of reviewing the substance of agency action under the arbitrary or capricious standard.

It may well be that, if such analyses are well done, the agencies will be less vulnerable to judicial scrutiny. The statutory prescriptions of the considerations to be explored in the analyses deal with such matters as the need for, and the objectives of, the proposed rule, the specification of a reasonable number of significant alternatives to the rule, and the projected economic effects, including costs and economic benefits—and the projected health, safety, environmental, and other effects—that may result from the rule. At its broadest, a cost-benefit study arguably bears directly on the rationality of a rule; and a favorable cost-benefit ratio could tend to underscore a lack of arbitrariness on the part of the agency.

Rigorous regulatory analysis of the kind contemplated by S. 262 could, indeed, be of great help to a reviewing court in coming to grips with what is for the court the hardest part of its reviewing task, namely, review of the substantive aspects of a rule under the arbitrary or capricious standard. Because of the frequently arcane and complex subject matters that many of the agencies today are required to address in informal rulemaking, the reviewing courts need all the aids to understanding they can get; informed and expert regulatory analyses can be very useful in this regard. They may even convince the agency itself that it is barking up the wrong tree, and thus there may not even be a rule to review, thereby enabling a court of appeals to reduce its backlog of Title VII and Freedom of Information Act appeals.

Executive intervention in the rulemaking process by regulatory analysis, whether it be under statutory direction or by executive order, may create at least one serious problem that derives from what may happen after the notice and comment period is over but before promulgation. This, of course, is the so-called “*ex parte* contacts” problem. It stands to reason that the executive or presidential interest does not end once the initial and final regulatory analyses are filed. Indeed, it presumably is all the more intense as the agency ponders its decision. A private citizen is free to call up his congressman and tell him in the strongest terms how he should vote on a pending bill. What are, or should be, the limits upon the President’s communication of views to his subordinates engaged in the exercise of delegated lawmaking powers by informal rulemaking?

Two cases presently under submission in our court dramatically pose this problem. Since I am on neither panel, I can relate only what I gleaned from looking at the briefs. Both have arisen after the inception of the Executive Order 12,044 regulatory analysis program.

In one, the so-called ozone case, *American Petroleum Institute v. Costle*,¹⁶ petitioner National Resources Defense Council (NRDC) insists that an EPA regulation has been fatally flawed by contacts and discussions during the post-comment period between two members of the Council of Economic Advisors and the Chairman of the Council on Wage and Price Stability, accompanied by their staffs, and the EPA Administrator and his people. The Regulatory Analysis Review Group had filed its final analysis on the last day of the comment period, and four other memoranda memorializing meetings between EPA and the White House staff had been put in the rulemaking record shortly thereafter. But the other meetings I have referred to became known only after inquiries were made by a Senate subcommittee and by reason of Freedom of Information Act requests by NRDC. It appeared from these disclosures that EPA had been urged to relax the standard proposed, and the regulation as issued was in fact weaker than it had been when noticed for comment.

The Government argues that the Clean Air Act Amendments of 1977 distinguished between executive branch officials, on the one hand, and “interested” persons outside the executive branch, on the other. The latter, said the Government, must submit their written or oral communications to EPA for the record during the comment period. Contrarily, in the Government’s submission, intra-executive branch communications may be made after the comment period; and, of these, only written comments and written responses, not oral discussions, are required to be included in the record to be reviewed.

This case may turn on interpretation of the Clean Air Act. Both sides appealed to it, and neither cited any cases.

16. No. 79-1104 (D.C. Cir. Sept. 3, 1981) (slip op.). The court, Judge Wald dissenting, did not reach the merits of the *ex parte* contacts issue, holding instead that NRDC could and should have raised this procedural objection in a petition for reconsideration. *Id.* at 29-30.

The other case, *Sierra Club v. Costle*,¹⁷ involved performance standards for sulfur dioxide emissions from new coal-fired plants. The rulemaking started in 1978, and the comment period closed on January 15, 1979. Petitioner Environmental Defense Fund asserts that, in the post-comment but pre-decision period, the National Coal Association started a blitz to reverse the agency's idea of the proper emission ceiling, which had leaked to the outside world, enlisting members of Congress, as well as policy makers in the Department of Energy and the White House. EPA scheduled one meeting with the National Coal Association that petitioner was invited to, and did, attend. But EPA is said to have had six meetings during April of that year with congressmen and Administration officials, to which neither petitioner nor the National Resources Defense Council was invited. Senator Byrd of West Virginia was at one such meeting, along with Stuart Eizenstat of the White House staff, and a representative of the National Coal Association. It was claimed that the Deputy Secretary of the Department of Energy was also used by the National Coal Association as a conduit to transmit technical information to EPA during the post-comment period, as were several congressmen. In any event, the rule as issued was more favorable to the industry than was EPA's reputed earlier position.

I happily leave the immediate resolution of these issues to my colleagues,¹⁸ and relate here the circumstances publicly pressed upon them as making more concrete, for the purposes of this discussion, the problems that may attend upon executive intervention in the rulemaking process, however limited that intervention may start out to be.

The law of *ex parte* contacts in informal rulemaking is in a parlous and inconclusive state indeed. Certainly that is true in my circuit, even after a few

17. No. 79-1565 (D.C. Cir. April 29, 1981) (slip op.).

18. The District of Columbia Circuit handed down a decision in the *Sierra Club* case on April 29. Although most of the panel's 253-page opinion concerns the technical challenges to the final EPA rule, the court did discuss in some detail petitioner Environmental Defense Fund's challenge to that regulation based upon meetings between EPA officials and other interested persons, such as congressmen, industry representatives, and executive branch officials, including the President, that took place after the time for comments had expired.

The court determined that these meetings did not offend either the procedural review provisions of the Clean Air Act or the due process clause. Noting that, unlike some other statutes, the Clean Air Act did not ban such *ex parte* contacts, No. 79-1565, slip op. at 192, the court said they need only be noted in the docket if EPA determines that they were of signal relevance to the proceedings. *Id.* at 207-12. The opinion relied upon the legislative character of informal rulemaking in concluding that the agency could confer with congressmen and executive branch officials, including the President, as part of its effort to glean public sentiment and frame responsive regulations. *Id.* at 209-24.

The similarity of informal rulemaking to the legislative process also led the court to dispatch EDF's due process argument. Judge Wald wrote:

Where agency action resembles judicial action, where it involves formal rulemaking, adjudication, or quasi-adjudication among "conflicting private claims to a valuable privilege," the insulation of the decisionmaker from *ex parte* contacts is justified by basic notions of due process to the parties involved. But where agency action involves informal rulemaking of a policymaking sort, the concept of *ex parte* contacts is of more questionable utility.

Id. at 202-03 (footnotes omitted). The court went on to contend that the legitimacy of delegating broad legislative authority to administrative agencies depends upon their receptivity and responsiveness to the public, leaving open the inference that elected officials have a role to play in bringing the interests of the public to the attention of administrators. *Id.* at 203-04.

ventures into the field. I refer you on this score to Paul Verkuil's article in the current *Columbia Law Review*,¹⁹ which is the most comprehensive recent discussion of the problem that I have encountered. It, as a research study prepared for the Administrative Conference of the United States, supplied the basis for the recent action of that Conference last month in approving a formal recommendation on this subject limited to informal rulemaking by executive branch agencies.²⁰

The substance of that recommendation was that the rulemaking agency "should be free to receive written or oral policy advice and recommendations at any time from the President, advisors to the President, the Executive Office to the President, and other agencies, without having a duty to disclose these intragovernmental communications." This principle was, however, qualified by an exception to the effect that, to the extent that such communications "contain material factual information (as distinct from indications of governmental policy) pertaining to or affecting a proposed rule . . . ," the agency should promptly place copies of the written, or summaries of the oral, communications in the rulemaking file. The conduit problem is taken into account by the recommendation in a provision that all communications from intragovernmental sources containing or reflecting comments by persons outside the government should be so identified and placed in the public file regardless of the nature of their contents.

The Conference was far from unanimous in its approval of this recommendation, although I think it was recognized generally as a serious and substantial contribution to our thinking about this difficult subject. As a judge, I can see in it a potential for much litigation over what is factual information as distinct from governmental policy, but that is the kind of work which judges are paid to do—always, of course, within the wise and prophetic protection provided by the Constitution against reduction of our compensation while in office.

I think it likely that ambivalence will continue to pervade the *ex parte* contacts problem until we face up to the question of whether legislation by informal rulemaking under delegated authority is, in terms of process, to be assimilated to lawmaking by the Congress itself, or to the adversary trial carried on in the sanitized and insulated atmosphere of the courthouse. Anyone with experience of both knows that a courtroom differs markedly in style and tone from a legislative chamber. The customs, the traditions, the mores, if you please, of the processes of persuasion are emphatically not the same. What is acceptable in the one is alien to the other. We should at least not be surprised if we encounter difficulties when lawmaking is delegated to be done by outsiders, but under a process for which the virtue is claimed that it is like that of the legislature itself.

19. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

20. 1980 ADMINISTRATIVE CONF. OF THE U.S., INTERGOVERNMENTAL COMMUNICATIONS IN INFORMAL RULEMAKING PROCEEDINGS, Recommendation 80-6, at 68-70 (1981) (adopted Dec. 12, 1980).

