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# RE-INVENTING RULEMAKING

E. DONALD ELLIOTT\*

## INTRODUCTION

Bob Anthony and Tom McGarity both make a number of important, perceptive points, and I find myself in substantial agreement with each of them.

I have only two principal disagreements with Bob Anthony. First, I believe that a court should not go behind the objective terms of a statement of agency policy to speculate about whether the statement was “really intended” to bind the public. If by its terms an agency’s general statement of agency policy is limited to establishing general policies and explicitly states that the policies must be justified *de novo* in subsequent applications where the policies are challenged, then a court should not invalidate the policies on the grounds that, contrary to what the agency’s statement says it is, the court thinks that it is “really” or “practically” a “non-rule rule” made without benefit of proper rulemaking procedures.<sup>1</sup> Second, I believe that courts should not attempt to force all agency policymaking into the mold of notice-and-comment rulemaking. Notice-and-comment does not always provide genuine public participation in legislative rulemaking; it is useful primarily as a record-making device and is generally employed when a rule is in near-final form.

### I. IS A RULE BINDING? HEEDING THE AGENCY’S CHOICE

In my view, it is a fundamental tenet of administrative law, crucial to maintaining the proper balance between courts and agencies, that an agency’s action is what it says it is. This tenet follows from two basic principles: first, the *Morgan* rule<sup>2</sup> that courts should review agency action based on the agency’s contemporaneous statement of reasons, not

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1. See *contra* Robert A. Anthony, “Well, You Want the Permit, Don’t You?” *Agency Efforts to Make Nonlegislative Documents Bind the Public*, 44 ADMIN. L. REV. 31, 32 (1992) (distinguishing between “practically binding” and “legally binding” rules).

2. See *United States v. Morgan*, 313 U.S. 409, 422 (1941).

speculation about what was “really” in the mind of the decisionmaker;<sup>3</sup> and second, the fundamental principle recognized in cases such as *Vermont Yankee*<sup>4</sup> and *Bell Aerospace*<sup>5</sup> that it is a matter of agency discretion whether to develop policy by rulemaking, as opposed to case-by-case adjudication.

Of course, if an agency says initially that a policy statement is not a binding rule and then later treats it as if it were a binding rule by refusing to engage in genuine reconsideration of its contents in a subsequent case, a court should invalidate the agency’s action *in the individual particular case* on the basis that the action lacks sufficient justification in the record.<sup>6</sup> However, in my view the agency’s failure to justify *de novo* its action casts no doubt on the validity of the nonbinding, generic policy. The agency’s error in such cases is in acting subsequently without proper record justification in the individual proceeding; the agency did not err in its initial creation of the nonbinding, generic policy.

The distinction between invalidating an individual action improperly taken in reliance on a nonbinding policy statement and invalidating the policy statement itself is important. As in the television commercial in which the automobile repairman intones ominously “pay me now, or pay me later,” the agency has a choice: It can go through the procedural effort of making a legislative rule now and avoid the burdens of case-by-case justification down the road, or it can avoid the hassle of rulemaking now, but at the price of having to engage in more extensive, case-by-case justification down the road. The central point is, however, that this is and should remain the *agency’s* choice.

At least since Kenneth Culp Davis first published his *Administrative Law* treatise in 1958, most American academic students of administrative law have been overly enamored of the formal beauty of the notice-and-comment process for securing public participation. Consequently, academic commentary has deplored the rule of law firmly established by

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3. *Camp v. Pitts*, 411 U.S. 138, 143 (1973); *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (noting that a “court is not empowered to substitute its judgment for that of the agency”).

4. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

5. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (unanimously reaffirming that even in cases announcing major shifts in policy, the choice between rulemaking and adjudication lies within the agency’s discretion); *see also* BERNARD SCHWARTZ, *ADMINISTRATIVE LAW* § 4.17 (3d ed. 1991) (discussing related cases).

6. *See, e.g., McLouth Steel Prods. Co. v. Thomas*, 838 F.2d 1317, 1325 (D.C. Cir. 1988). For other examples of cases applying this principle, *see* Bryan G. Tabler & Mark E. Shere, *EPA’s Practice of Regulation-by-Memo*, *NAT. RESOURCES & ENV’T*, Fall 1990, at 3.

the Supreme Court and reiterated unanimously over the years that agencies are free to choose between rulemaking and other forms of agency action for making policy.

In this instance, the Court is more insightful than the commentators. There can be no abstract answer to the question whether rulemaking or case-by-case evolution is the better way to make policy; in each case the answer depends on a variety of factors, including: how sure the agency is about what policy it wishes to adopt, how frequently the agency anticipates the question will come up, whether the issue is inherently entangled with other issues that can best be addressed comprehensively, and what other issues are currently pressing for the agency's attention. These factors make the agency's choice between rulemaking and case-by-case evolution a prudential one that should not be second-guessed in the courts.

The only proper role for the courts in determining the appropriateness of an agency's choice of either rulemaking or case-by-case evolution is to ensure that the statutory and due process rights of affected parties to receive notice of, and an opportunity to participate in, the adoption of agency rules, are respected. It is a fundamental principle of administrative law that these rights of participation can be properly respected in adjudication as well as rulemaking; therefore, the choice between the two procedures can and should be left to the agency.

## II. RECORD-MAKING—THE PRIMARY FUNCTION OF NOTICE-AND-COMMENT PROCEDURE

The primary function of the notice-and-comment rulemaking process in our system has shifted since the enactment of the Administrative Procedure Act (APA) in 1946. What was once (perhaps) a means for securing public input into agency decisions has become today primarily a method for compiling a record for judicial review.<sup>7</sup> No administrator in Washington turns to full-scale notice-and-comment rulemaking when she is genuinely interested in obtaining input from interested parties. Notice-and-comment rulemaking is to public participation as Japanese Kabuki theater is to human passions—a highly stylized process for displaying in a formal way the essence of something which in real life takes place in other venues. To secure the genuine reality, rather than a formal show, of public participation, a variety of techniques is available—from informal meetings with trade associations and other constituency groups,

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7. See William F. Pedersen, Jr., *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 50-51 (1975); see also Clean Air Act § 307(d), 42 U.S.C. § 7607(d) (1988) (requiring compilation of a "docket" (consisting primarily of the agency proposal, comments received, and agency responses) to use as the basis for judicial review).

to roundtables, to floating “trial balloons” in speeches or leaks to the trade press, to the more formal techniques of advisory committees and negotiated rulemaking. The notice-and-comment process is not worthless. It fulfills an important function—to compile a record for judicial review—not primarily to provide public input into government thinking, contrary to the assumption of many academics.<sup>8</sup> The importance of this record-making function has increased as the nature of the rules opened to the notice-and-comment procedure has come to encompass more highly technical factual and policy issues.<sup>9</sup>

With the shift in the nature of subjects opened to notice-and-comment rulemaking procedure—which was absolutely essential if the regulatory state was to continue to expand<sup>10</sup>—a mechanism was needed to develop a detailed record for judicial review of the highly technical proceedings held in effectuating the procedure. The courts responded with a series of decisions, which “transformed” notice-and-comment rulemaking.<sup>11</sup> The most important—and most burdensome—of these decisions

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8. See, e.g., SCHWARTZ, *supra* note 5, § 4.12, at 197 (“The purpose of the APA [notice-and-comment] rulemaking provision is to give the public an opportunity to participate.”).

9. As Professor Bernard Schwartz has observed, in recent years the “center of gravity” of government policymaking has moved to the notice-and-comment rulemaking process. *Id.* § 4.3, at 168. In a pair of watershed decisions in 1973, *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973) (holding that language of provision authorizing ICC to set freight car charges “after hearing” did not trigger stricter requirements of APA procedures), and *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 620 (1973) (holding that FDA generic rulemaking that eliminates factual issues for adjudicatory hearing is appropriate), the Supreme Court transformed notice-and-comment rulemaking under § 553 of the APA from a largely unimportant device to be used primarily for the consideration of procedural matters, as originally contemplated by the drafters of the APA, into the principal mechanism through which the government develops detailed technical standards regulating the economy. For better or for ill, much of the expansion of the “regulatory state” during the 1970s (and, much to the embarrassment of the Reagan Administration, its continued growth in certain areas throughout the 1980s) could not have been accomplished without the extraordinary power of notice-and-comment rulemaking as a technology of justice. Only through the extraordinary power of notice-and-comment rulemaking could a tiny agency like the EPA, with less than one-half of one percent of federal employees, see U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1991, at 332 (111th ed. 1991) (tbl. 537), leverage its efforts so that it can impose roughly half of the total costs of government regulation on the economy as a whole. See Kirk Victor, *Quayle’s Quiet Coup*, NAT’L J., July 6, 1991, at 1676, 1677 (stating that about half of the \$185 billion annual cost of government regulation stems from environmental rules).

10. The command-and-control system of regulation is reaching its practical limits. See Marshall J. Breger et al., *Providing Economic Incentives in Environmental Regulation*, 8 YALE J. ON REG. 463 (1991) (containing panel discussion on economic incentives as an alternative to the command-and-control system of environmental regulation). For a humorous account on the pathology of an overloaded system, see Douglas M. Costle, *Brave New Chemical: The Future Regulatory History of Phlogiston*, 33 ADMIN. L. REV. 195 (1981). My own thoughts about how regulatory techniques will have to change in the future to accommodate the tasks that lie ahead are stated in my recent Siebenthal Lecture. See E. Donald Elliott, *Crossroads in Environmental Law*, NO. KY. L. REV. (forthcoming).

11. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 567 (2d ed. 1985).

require an agency to give notice of the specifics on which it proposes to base its action, and then to respond in detail to "significant" comments received.<sup>12</sup> These requirements, which are necessary for modern judicial review of the basis for agency action, are inherently in tension with the earlier, public-input function of the notice-and-comment process. If the agency is to state the detailed basis for its actions in such a way that its actions will survive judicial review, public input through formal notice-and-comment rulemaking must come relatively close to the end of the agency's process, when the proposed rule has "jelled" into something fairly close to its final form.

If the courts were to follow Anthony and develop a rigid rule that all general statements of guidance or policy must be made through the full-scale notice-and-comment procedure contemplated by section 553 of the APA, the modern administrative process would literally grind to a halt. As Tom McGarity has shown in his fine paper, the informal rulemaking process has gradually "ossified" to the point that it is cumbersome at best.<sup>13</sup> Justice (then-Professor) Scalia made much the same point a decade ago when he wrote that "the procedural advantages of rulemaking for the agency itself are headed for extinction: The courts have attached many procedural requirements not explicit in the APA . . . includ[ing] . . . that the agency justify the rule in detail and respond to all substantial objections raised by the public comments."<sup>14</sup>

Ironically, the Davis/Anthony program to make rulemaking the exclusive vehicle for the development of agency policies would actually have perverse effects on the very public participation values it is intended to facilitate. If the courts were to adopt Anthony's perspective, agencies would not be able to use policy statements, manuals, guidances, and other similar devices for making and communicating policy as often. The administrative process would clearly suffer: Public input into the process of adopting policy would decrease, and administrative arbitrariness would increase.

While agencies sometimes make changes in response to comments received during the notice-and-comment rulemaking process, most of

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12. See *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240 (2d Cir. 1977); see also *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that an agency must examine relevant data and articulate a satisfactory explanation for its action).

13. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992).

14. Antonin Scalia, *Back to Basics: Making Law Without Making Rules*, REGULATION, July/Aug. 1981, at 25, 26.

these changes are to interstitial details, with the basic structure and philosophy of the rule left more or less intact. Indeed, when the public participation function of the notice-and-comment process is “too successful” and an agency decides to make fundamental changes to the proposal, a court requires re-proposal of the rule so that the record-making function of the process is not undermined.<sup>15</sup>

Because of the need to create a record, real public participation—the kind of back and forth dialogue in which minds (and rules) are really changed—primarily takes place in various fora well in advance of a notice of proposed rulemaking appearing in the *Federal Register*. The dangers of the informal, unstructured process of real dialogue which impacts on the formation of rules, where only some interests have access to the process, are obvious and real. Much of the progress in administrative law in recent years has come in restructuring this “front end” of the process. It is here that the work of “re-inventing rulemaking,” as I mean the term, is taking place.

There is a range of techniques that agencies are developing for promoting discussion and a rich, productive consideration of options prior to developing a record for judicial review through notice-and-comment rulemaking procedure. What all these new techniques for “re-inventing rulemaking” have in common is their use of *representatives* as a surrogate for participation by all interested members of the public. Years ago, Justice Holmes wrote with customary perspicacity: “Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption.”<sup>16</sup> No large community makes all its laws through town meetings; similarly, legislatures cannot function as a committee of the whole on most issues. Even courts have found that in complex, multi-party cases, genuine dialogue is frustrated rather than promoted if every interested party files a separate brief.

These basic lessons have somehow been forgotten, if they were ever learned, in administrative law where notice-and-comment rulemaking is concerned. It is literally impossible for an agency to conduct a genuine dialogue among the 10,000 separate parties who submit separate comments in some EPA rulemakings. If the notice-and-comment procedure is to function to promote genuine dialogue, as opposed to merely giving parties a chance to put their objections and the agency’s answers on the

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15. See, e.g., *Shell Oil Co. v. EPA*, 950 F.2d 741, 757-63 (D.C. Cir. 1991); *Chocolate Mfrs. Ass’n v. Block*, 755 F.2d 1098 (4th Cir. 1985); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1021 (D.C. Cir. 1978).

16. *Bi-Metallic Investment Co. v. State Bd. of Equalization of Colorado*, 239 U.S. 441, 445 (1915).

record for judicial review, it will have to be re-engineered to promote the substance of dialogue through the process of representation.

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