The Overjudicialization of Regulatory Decisionmaking

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There is a fundamental contradiction between the substantive task regulatory bodies, such as public utility commissions, are charged with performing and the process imposed upon them for doing it. This contradiction, often reinforced by the nature of judicial review, constitutes a severe hindrance to the effectiveness of regulation.

The heart of the contradiction stems from the fact that most of the matters brought before utility regulators for resolution are legislative in nature. They are generally matters for prospective application, such as ratemaking, tariff filings, forecasting, corporate structure and governance, and terms and conditions of service. While there are such cases as service complaints which require analyzing historic fact and fashioning remedies for victims of past problems, these cases tend to be both fewer in number and less demanding of regulatory resources than matters of prospective application. Despite the nature of the workload of regulatory bodies, the process imposed on regulators for decisionmaking is, for the most part (with the notable exception of sunshine laws), a judicial model more appropriate for the minority of cases rather than a model designed for the types of cases that constitute the bulk of the workload. Stated more succinctly, the bulk of the regulatory workload is legislative in nature; yet the decisionmaking process employed is, for the most part, judicial.

The significance of the contradiction between the substance and process of regulation cannot be understated. The contradiction merits close scrutiny. Gathering and processing information is vastly different in judicial and legislative models. Legislating, when properly conducted, seeks the broadest data base possible. Information and opinions are received and/or sought, heard, and carefully analyzed. The process occurs at both formal (e.g., hearings) and informal (e.g., private conversation) levels. The goal is to provide the decisionmaker with as much information from as many perspectives as possible so that an informed decision can be made. Outside entities can enhance, but never be in a position to limit or preclude, the flow of information. The decisionmaker is free to be both a passive recipient of information or an active solicitor thereof. The latter is of particular importance in light of the fact that many of the interests affected by a decision are not likely to be present in the decisionmaking forum. Moreover, legislators are free to use whatever knowledge or expertise they possess to make a decision.

Knowledge and expertise should be critical to the quasi-legislative function in most regulatory bodies, whose very reason for existence (separate from the legislature and the courts) is their purported ability to make both legislative and judicial decisions in specialized, highly complex, and very technical areas where it is assumed courts and legislators do not have the adequate expertise nor the time to acquire it. Indeed, it is the theory, if not virtually always the reality of regulation, that a substantial number of commissioners (as well as their staffs) should be drawn from professions with relevant skills, such as law, economics, and engineering.

In contrast to the legislative process, the judicial model for decisionmaking is characterized by a deliberately limited information flow with an essentially passive decisionmaker. Neither facts nor opinions are generally sought by the decisionmaker. The litigants try as best they can to limit the information flow to that which is most useful to them. There is no informal information gathering by the decisionmaker. Indeed, the decisionmaker is largely precluded from such initiative by both *ex parte* rules and requirements that decisions be based exclusively on the record. The record itself is, of course, severely limited by the decision of parties not to present certain information, by the rules of evidence, and by the actions of parties, attorneys, and witnesses to limit the flow of information to the decisionmaker.

Decisionmaking Models

These fundamentally divergent methods of decisionmaking make a great deal of sense in the very different contexts in which they are applicable. The legislative model is designed for decisionmaking which is both prospective in nature and universally binding. The judicial model is applied in a retrospective review and, while the result may have broader implications, is binding only upon those who participated in the proceeding. The problem in regulation is that regulators are required to make decisions

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binding on everyone prospectively, but are expected to arrive at such decisions through a process designed for retrospective review and limited applicability. In effect, regulators have been given the burden of legislating without the operating freedom of a legislator. They have the trappings of a judge without the assurance of having all affected interests before them.

The reasons for the paradoxical role of regulators are multifold. They stem fundamentally from the perceived need to impose a legitimizing process on agencies that are doing the work the marketplace would do in nonmonopoly settings. The judicial model offers a prepackaged set of credible, widely accepted processes for decisionmaking. Those processes provide procedural protection for the regulated entity, the right to be heard for other parties, and external discipline that both limits the discretion of the decisionmaker and reduces the possibility of abuse or gross unfairness. The imposition of the process also makes it politically, legally, and otherwise more justifiable for legislatures to delegate some of their responsibilities to an administrative agency. While the reason for the imposition of the judicial decisionmaking process on legislative decisions is thus comprehensible, the dynamics it creates are often counterproductive for decisionmakers, and, indeed, to the quality of decisionmaking itself.

The first casualty of the process is the flow of information. As in any judicial or quasi-judicial process, advocates for particular interests carefully limit the information they provide regulators to conform to the narrow data set helpful to their position. They try as best they can, aided and abetted by application of the rules of evidence, to limit the ability of every other party to provide more input. Indeed, parties often find it in their interests to retain high-quality expertise but to restrain both the expert and the decisionmaker in ways that preclude the full tapping of the expertise for the decision itself. While such a constraint makes eminent sense in a setting where all parties in interest are present at bar and capable of representing their own interests, that reassuring circumstance is rarely encountered in the regulatory area. Indeed, some of the least presented interests are often the mass of small consumers of basic public utility services, such as small businesses or residential electric or gas customers. As a result, particular interests, sometimes completely unbalanced by countervailing interests, and almost never adequately balanced by all affected interests, dominate the flow of information.

That dominance is reinforced by procedural rules that are arcane to the public, and often even somewhat foreign to general law practitioners (e.g., rules other than those under relevant administrative procedure acts). Further limitations on the flow of information are imposed by requiring legal representation for appearances by parties in proceedings, and hearings conducted in distant cities (i.e., Washington, D.C., or state capitals). Moreover, the costs involved in litigating are high enough that only parties with very large stakes in the outcome will ever undertake serious intervention. Finally, in most large regulatory jurisdictions, cases are tried by administrative law judges or examiners whose qualifications for hearing cases are legal rather than substantive backgrounds. Hence, the skill most emphasized for those hearing cases and proposing disposition thereof is expertise in the process itself rather than expertise in the substance of matters before the regulatory body.

The decisionmaker is highly isolated in the process, precluded from applying information or knowledge gained from sources other than the formal record. As former FERC Commissioner Charles Stalon has so appropriately noted, for regulators to properly perform their duty, they must "feign ignorance," a quality presumably undesirable in a commissioner, especially one appointed with technical qualifications pertaining to the subject area regulated. Immersing oneself in the broad body of literature on a subject, conversing with experts, or even with colleagues in private is generally not permissible or at least cannot be overtly relied on in making decisions. Exploring the nuances of an expert's opinion or a party's arguments is similarly barred outside the hearing room; yet, the presence of a commissioner of a large state or at the federal level in hearings is physically impossible because of the sheer volume of cases and pressure of work. Moreover, commissioners often are precluded from effectively interacting with their own staffs on decisions because of quasi-judicial notions of separation of functions. While such isolation and even poverty of information has the desirable result of assuring the purity of the process, it contributes nothing to the beauty of the product. It is little wonder that both litigants before commissions and the public in general are often bewildered by seemingly inscrutable regulatory decisions. Indeed, given all of the procedural obstacles encountered, it is astounding that there are any quality decisions rendered at all.

Judicial Review

The shortcomings of the process are greatly reinforced by judicial review. Indeed, one of the great prophylactics against regulatory ini-

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tiative, and often against the public interest emerging above the din of self-interested parties asserting their claims, is the prospect of reversal by a court. Judicial review, by its very nature and by the training and vocation of the judges conducting it, is most keenly attuned to process questions. It is far more likely that the appellate bench will have process expertise than it will have more than a modicum of substantive knowledge of the subject matter at bar. Indeed, in recognition of the expertise possessed by regulatory bodies on these substantive matters, appellate courts are supposed to give them wide discretion. That substantive deference may have the ironic effect of intensifying the level of procedural scrutiny. It is, therefore, not at all surprising that regulatory agencies tend toward the cautious road of procedural orthodoxy in an effort to avoid reversal. Ironically, it could well be argued that the nature of judicial review not only reinforces and renders more rigid the judicial model but, similarly, that it tends to make process issues as contentious, if not more so, as substantive matters. It certainly makes process errors more likely to be rectified on appeal than substantive ones.

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The ultimate irony of imposing a judicialized model in the regulatory arena is that, in an effort to assure the credibility and integrity of the process, we have severely impaired its ability to perform its primary responsibility, namely to carry out the public interest. We have erected a system premised on the assumption that all interests and perspectives will be heard from, and the myth that from the crucible of legislative combat the ultimate public interest will emerge. Unfortunately, the process has become so complicated, arcane, expensive, and often inaccessible to the public that the likelihood that all relevant views will be heard is virtually nonexistent, and the certainty that those with the greatest stake in the outcome will be heard most loudly is very great. Hence, the process has come full circle to defeat itself and perhaps do injury to the public interest.

One dynamic that inevitably results from the use of the judicial model is that lawyers, both internal and external to regulatory agencies, play an inordinately central role in decisionmaking. While economists, accountants, engineers, and other professionals play their roles (e.g., in the economic regulation of industries such as electric power and natural gas), it is lawyers who decide what information can be considered and the weight attached to it. It is generally lawyers who make the arguments, conduct the examination and cross-examination of witnesses, write and apply the procedural rules, and ultimately write decisions. The fact that a profession whose members are trained primarily in process (largely judicial) should come to dominate a system which requires the interplay of so many substantive disciplines should be of major concern. While lawyers are trained to develop analytical skills that are extremely useful in both advocacy and decisionmaking, they are also of the profession most likely to put form over substance, to create procedural blocks to effective decisionmaking, and to impede the flow of information. Thus, while lawyers' skills are both useful and necessary in the regulatory arena, they should not be entitled to the central role assigned them by the judicial model. Putting them in such a role tends to increase the likelihood that process concerns will prevail over substance and to increase the risk of a level of institutional rigidity that is counterproductive for informed and effective decisionmaking. While those risks vary widely depending on personalities, self-confidence levels, assertiveness, and other characteristics of the people actually interacting, the central role lawyers have come to play in regulation is something that requires continuous scrutiny. While it is certainly true that not all lawyers are hidebound proceduralists, it is probably fair to say that the legal profession is the one most likely to be so. That tendency is often not helpful.

One of the inherent disincentives to critique the system is the implied duty to suggest alternatives for improvement. That disincentive is particularly acute when it is a lawyer's critique of a lawyer-driven world for a lawyer's journal. Nonetheless, such a task is hardly novel for one sufficiently foolhardy to have already undertaken the job of being a regulator. The fundamental thrust of any procedural reform should be to distinguish between judicial and legislative tasks. A judicial task, such as hearing a consumer complaint against a utility, by definition, should utilize a judicial dispute resolution method if the parties cannot come to a mutually acceptable settlement. Legislative decisionmaking processes in regulation, such as ratemaking and rulemaking, also require that some of the same values inherent in the judicial model be preserved. These include the opportunity to be heard in a meaningful way, the right to know the information that is influencing the decisionmaker's thinking on a matter, the opportunity to hear and rebut or otherwise meaningfully respond to an opponent's view, the right to advance knowledge of the process and its

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rules, and protection from arbitrary or capricious action by the decisionmakers. Those elements of due process are essential for fairness; but they do not require a full blown judicialized decisionmaking model to be accrued. More important, they do not require the limitations in the flow of information that characterize the judicial process. What the quasi-legislative process requires is procedural fairness, not the kind of institutional rigidity that often interferes with the ability to make sound decisions.

Some examples of processes which would protect the elements of fairness while avoiding excessive judicialization of the process (some of which are already in place in some jurisdictions) would be allowing experts with divergent views to directly confront each other on the same panel by argumentation, by mutual cross-examination of due breadth and depth, and by direct interaction with the decisionmaker. Attorneys could play a role in helping to formulate presentations and participate in examination of witnesses, but they need not play the central role they do in the hearing room. Informal discussions between parties and their experts with regulators should not only be permitted, they should be encouraged—as long as a record is made of them, other parties are given notice of these contacts, and other parties are afforded the right to be present and/or the opportunity to respond in a timely fashion. Administrative judges could sit on the bench in tandem with an expert in the substantive matter at hand in order to assure both procedural fairness and a high level of substantive awareness in decisions. The opinion(s) of those who hear the case should be provided to all parties before the commissioners decide the matter, so that critiques of a proposed disposition of a case will be available to the decisionmaker at the time a final decision is rendered.

Judicial review should, then, focus not on adherence to rigid procedural requirements, but rather on whether the fundamental values of due process fairness were observed and adhered to. Parties should be given easy and economical access to the process in order that the greatest diversity of opinion is afforded full opportunity to be heard. While these reforms are not meant to be be all inclusive (indeed, they are relatively moderate), they would be helpful as steps toward reducing the procedural rigidity that impedes the flow of information in regulatory settings. In short, regulators should be given the same procedural freedoms legislators have to render their legislative decisions, tempered only by recognition of and respect for the values inherent in due process.